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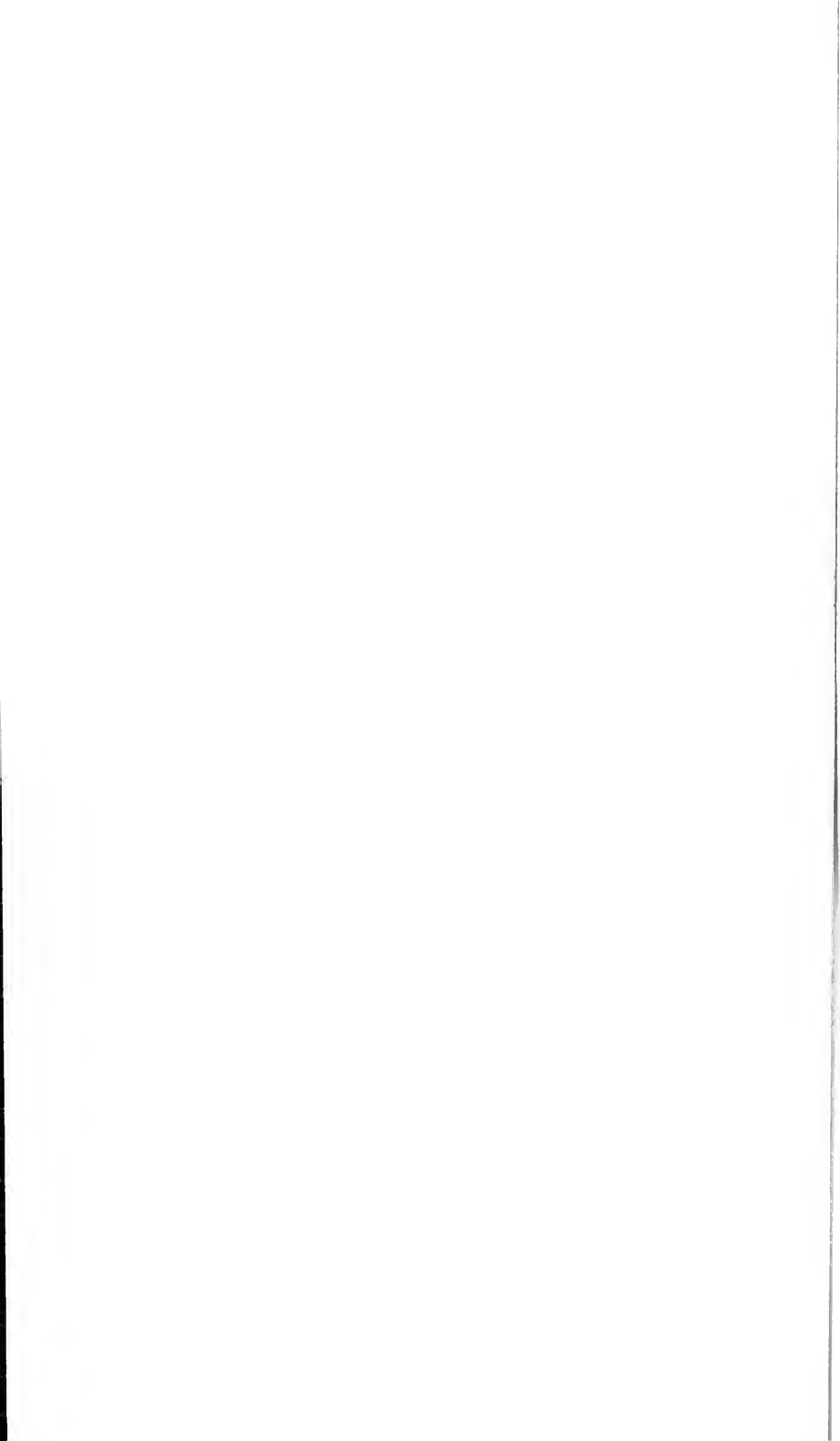
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2979

No. 15207

**United States
Court of Appeals**
for the Ninth Circuit

C. H. WENTWORTH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

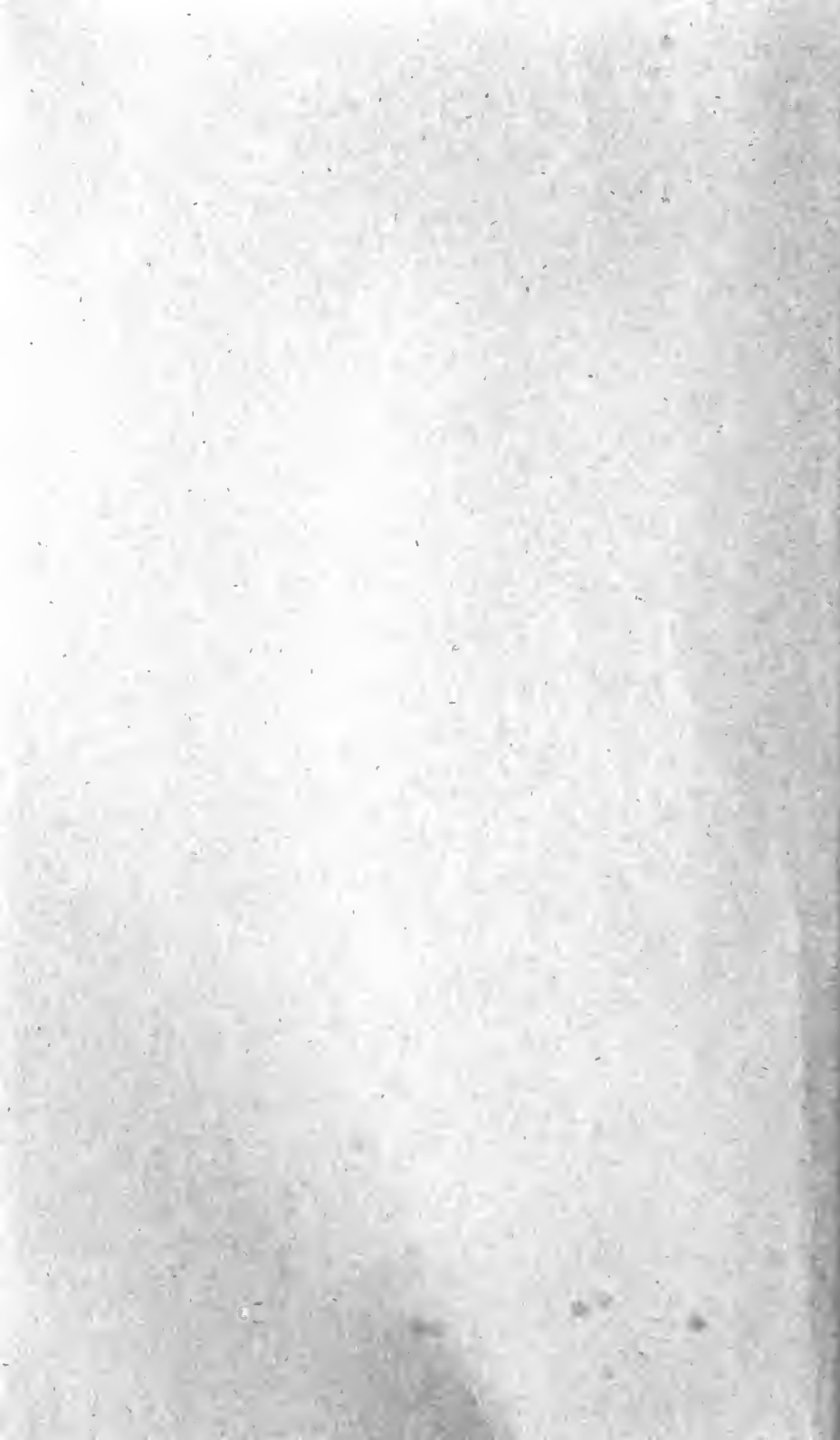
Respondent.

Transcript of Record

**Petition to Review a Decision of the Tax Court
of the United States**

FILED

OCT -2 1956



No. 15207

United States
Court of Appeals
for the Ninth Circuit

C. H. WENTWORTH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

ERIC L. BURTON, Esq.

For Respondent:

MARK TOWNSEND, Esq.

DOCKET ENTRIES

1953

Nov. 16—Petition received and filed. Taxpayer notified. Fee paid.

Nov. 17—Copy of petition served on General Counsel.

Nov. 16—Request for Circuit hearing in Los Angeles filed by taxpayer. 11/30/53, granted.

1954

Jan. 6—Answer filed by General Counsel.

Jan. 12—Copy of answer served on taxpayer, Los Angeles.

1955

Feb. 8—Hearing set Apr. 25, 1955, Los Angeles.

Apr. 25—Hearing had before Judge Turner on merits. Stipulation of Facts filed at hearing. Briefs due 90 days from April 25, 1955; replies due 120 days from Apr. 25, 1955.

May 4—Transcript of Hearing 4/25/55 filed.

July 5—Brief filed by taxpayer. 7/26/55, copy served.

July 25—Brief filed by General Counsel.

Aug. 23—Reply brief filed by taxpayer. Copy served 8/24/55.

1956

Mar. 12—Opinion filed. Decision will be entered for the respondent. Copy served 3/13/56.

Mar. 14—Decision entered, Judge Mulroney, Div. 9.

June 7—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by petitioner.

June 13—Proof of service filed.

1956

June 12—Designation of Contents of Record on Review filed.

June 12—Affidavit of service by mail of petition for review filed.

June 12—Affidavit of service by mail of Designation of Contents of Record on Review filed.

June 14—Proof of service of designation of contents of record on review filed.

The Tax Court of the United States

Docket No. 51260

C. H. WENTWORTH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the office of the Commissioner of Internal Revenue in his notice of deficiency designated by reference ARC-AP-SF LA-90D-DRR, Regional Office of the Appellate Division, Los Angeles, California, dated August 24, 1953, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with principal office at 1700 East Olympic Boulevard, Los Angeles

22, California. The return for the period here involved was filed with the Collector of Internal Revenue for the 6th district of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on August 24, 1953.

3. The deficiency as determined by the Commissioner is in income taxes for the calendar year 1947 in the amount of Sixty Thousand Nine Hundred Two and 38/100 Dollars (\$60,902.38), of which Sixty Thousand Nine Hundred Two and 38/100 Dollars (\$60,902.38) is in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

a) In determining the deficiency in income tax for the calendar year 1947, the Commissioner has erroneously included as taxable dividends the sum of Eighty-Two Thousand Five Hundred Twenty-two and 06/100 Dollars (\$82,522.06).

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

a) That the said sum of Eighty-two Thousand Five Hundred Twenty-two and 06/100 Dollars (\$82,522.06) was part of a Two Hundred Thousand Dollars (\$200,000.00) payment from the Flexo Manufacturing Company, Inc., to taxpayer; said Two Hundred Thousand Dollars (\$200,000.00) being payment in full of notes of said company held by taxpayer.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that the deficiency due from the petitioned for the year 1947 should not be in excess of none.

/s/ ERIC L. BURTON,
Counsel for Petitioner.

Duly verified.

EXHIBIT A

Regional

1250 Subway Terminal Building
417 S. Hill Street,
Los Angeles 3 Calif.

ARC-AP-SF
LA-90D-DRR

August 24, 1953.

Mr. C. H. Wentworth,
1700 E. Olympic Blvd.,
Los Angeles 21, Calif.

Dear Mr. Wentworth:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1947, disclosed a deficiency of \$60,902.38 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with the Tax

Court of the United States, at its principal address, Washington, 4 D. C. for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturday, Sundays and legal holidays are to be counted in computing the 90th-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form, in duplicate, and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, 417 S. Hill Street, Los Angeles, 13, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Yours very truly,

T. COLEMAN ANDREWS,
Commissioner of Internal
Revenue,

By W. T. TIGNOR,
Associate Chief, Appellate.

Enclosures;
Statement,
Form 1276,
Agreement form.

Statement

C. H. Wentworth
1700 East Olympic Blvd.
Los Angeles 21, Calif.

Tax Liability for the Taxable Year Ended
December 31, 1947

Income Tax	
Year	Deficiency
1947	\$60,902.38

In making this determination careful consideration has been given to the report of examination dated May 6, 1952, to your protest dated September 8, 1952, and to the statements made at the hearing held on December 17, 1952.

A copy of this letter and a copy of the statement have been mailed to your representative, Mr. Clarence W. Horn, 905 W. I. Hollingsworth Bldg., 606 S. Hill St., Los Angeles 14, Calif., in accordance with the authority contained in the power of attorney executed by you.

Adjustment to Net Income

Taxable Year Ended December 31, 1947

Net income as disclosed by amended return.....	\$ 26,310.46
Additional income:	
(a) Dividends increased	82,522.06
Net income as adjusted.....	<u>\$108,832.52</u>

Explanation of Adjustment

(a) During the year 1947 you received a payment in the amount of \$200,000.00 from the Flexo Manufacturing Company, Inc., of which you are the major stockholder. No part of the above payment received by you was reported as income in your 1947 income tax return. It is determined that of the \$200,000.00 payment received, the sum of \$82,522.06 represents a taxable dividend reportable as income for the year 1947.

Computation of Tax

Taxable Year Ended December 31, 1947

Net income as adjusted.....	\$108,832.52
Less: Exemption	500.00
<hr/>	
Amount subject to tentative tax.....	\$108,332.52
Tentative tax	\$ 74,735.94
Less: 5% of tentative tax.....	3,736.80
<hr/>	
Combined normal tax and surtax.....	\$ 70,999.14
Correct income tax liability.....	\$ 70,999.14
Income tax liability shown on amended return, Account No. 900549, 6th California District.....	10,096.76
<hr/>	
Deficiency of income tax.....	\$ 60,902.38

Received and filed November 16, 1953, T.C.U.S.

Served November 17, 1953.

[Title of Tax Court and Cause.]

REQUEST FOR DESIGNATION OF
PLACE OF HEARING

Comes now C. H. Wentworth by his attorney, Eric L. Burton, and in accordance with Rule 26 of Rules of Practice Before the Tax Court of the United States requests that the Court designate that the hearing in the above-entitled proceeding be at Los Angeles, California.

/s/ ERIC L. BURTON,
Counsel for Petitioners.

Received and filed November 16, 1955, T. C. U. S.

Granted November 30, 1953.

Served December 1, 1953.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition and the subparagraph thereof.

5. Denies the allegations contained in paragraph 5 of the petition and the subparagraph thereof.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination be approved.

/s/ DANIEL A. TAYLOR, R.E.M.

Chief Counsel,

Internal Revenue Service.

Filed January 6, 1954.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed, by and between the parties hereto, by their respective counsel, that the following facts are true; provided however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true:

1. Attached hereto and marked Joint Exhibit 1-A and 2-B are respectively the original and amended individual income tax returns filed by the petitioner for the taxable year 1947.

2. On January 1, 1953, petitioner transferred the following assets, shown at cost, to the Flexo Manufacturing Company, Inc., a newly formed corporation, in exchange for capital stock:

Cash in Bank	\$ 12,704.63
Accounts Receivable	105,922.97
Inventory	55,685.71
Furniture	286.67
Machinery and Equipment	18,073.64
Auto and Equipment.....	3,235.30

The foregoing assets were substantially all of the assets of the sole proprietorship business carried on by taxpayer under the firm name and style of Flexo Manufacturing Company.

The following liabilities and reserves were also transferred by taxpayer to said corporation:

Accounts Payable	\$10,793.54
Reserve for Federal Old Age Benefits Tax	272.40
Reserve for Federal Payroll Excise Tax..	108.40
Reserve for California Unemployment Insurance Tax	503.83
California Sales Tax	6.10
Notes Payable	4,500.00
Bonus Payable	11,371.18
Reserve for Bad Debts.....	4,544.49
Reserve for Depreciation Machinery and Equipment	7,836.81
Reserve for Depreciation Autos and Equipment	3,235.30

The foregoing transfers resulted in a capital contribution to said corporation, on a book basis, in the amount of \$152,737.44.

3. In exchange for the transfer, the petitioner received 120,830 shares of capital stock, par value, \$1.00 per share, issued September 26, 1944. He transferred five qualifying shares to Robert Steele and 4,167 shares were sold by the corporation to Lloyd Wallmer for cash, resulting in a total issuance of 124,997 shares by the corporation.

4. Petitioner maintained an open account in his name on the books of the corporation styled "Accounts Receivable—C. H. Wentworth."

Attached hereto and marked Joint Exhibit 3-C is a true copy of such account as shown on the books of the corporation for the years 1943 and 1944. As of February 27, 1943, this account had a credit bal-

ance of \$2,197.20. On the same date, petitioner advanced the corporation \$100,000 and received a note bearing six per cent interest due in one year. On April 14, 1943, the petitioner's open account reflected a credit balance of \$3,397.20 and on the same date, the petitioner advanced the corporation an additional \$100,000 and received an additional note bearing six per cent interest due in one year. Both notes were carried on the corporation books as "notes payable." As of December 31, 1943, the petitioner's open account reflected a debit balance in the amount of \$197,211.03. Attached hereto and marked Joint Exhibit 4-D is a true copy of the balance sheet of the corporation as of December 31, 1943.

5. On October 31, 1944, the petitioner's open account reflected a debit balance of \$200,742.60. On the same date, the corporation credited the open account with \$180,000, leaving a debit balance in the account of \$20,742.60, and charged a like amount to its capital account with a resultant capital deficit of \$23,095.56. No charge or entry was made to the notes payable account to petitioner and said notes in the amount of \$200,000 were not canceled. Attached hereto and marked Joint Exhibit 5-E is a condensed balance sheet of the corporation as of December 31, 1944.

6. No income was reported by the petitioner on his individual income tax returns as resulting from the credit by the corporation to his open account of

\$180,000, nor was any stock exchanged or surrendered by the petitioner.

7. In May, 1947, the corporation paid the petitioner the sum of \$200,000 at which time the notes were still in the possession of the petitioner and were, upon such payment, surrendered to the corporation and canceled. The accounting records of the corporation, prior to the payment, reflected notes payable to the petitioner in the amount of \$200,000 until the payment in May, 1947; at which time said payment was offset against the notes payable account on the books of the corporation.

8. Attached hereto and marked Joint Exhibits 6-F, 7-G, 8-H, 9-I and 10-J are true copies of the form 1120's filed by the corporation for the taxable years 1943, 1944, 1945, 1946 and 1947, respectively. No dividends have been declared by the corporation since its formation in January 31, 1943, through the period here involved. As of December 31, 1947, the corporation had earned surplus available for distribution in the amount of \$82,522.06.

/s/ ERIC L. BURTON,
Counsel for Petitioner.

/s/ R. P. HERTZOG,
Acting Chief Counsel, Internal Revenue Service,
Counsel for Respondent.

Filed at hearing April 25, 1955, T.C.U.S.

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

Filed March 12, 1956

A corporation in 1944 credited the accounts receivable account of its controlling stockholder for \$180,000, and debited its capital account for the same amount. Earned surplus at the end of that year was \$171,920.38. The corporation was indebted to the stockholder on two \$100,000 notes, overdue and payable at the time the particular credit was made. Held, under these circumstances the credit to the accounts receivable account in 1944 worked a corresponding offset in the notes payable account, and a corporate distribution of \$200,000 in 1947 was a taxable dividend to the extent of earnings and profits in that year, and not, as the stockholder contends, a payment by the corporation on the note indebtedness to him.

ERIC L. BURTON, ESQ.,

For the Petitioner.

MARK TOWNSEND, ESQ.,

For the Respondent.

OPINION

Mulroney, Judge.

The respondent determined a deficiency in income tax for the calendar year 1947 in the amount of \$60,902.38. The only issue is whether a distribu-

tion of \$200,000 in 1947 to the petitioner by a corporation, in which he was the controlling stockholder, was a taxable dividend to the extent of earnings and profits or a repayment of a loan, evidenced by notes, made by the petitioner to the corporation in prior years. All of the facts are stipulated and are now found accordingly.

The petitioner is an individual with a principal office at 1700 East Olympic Boulevard, Los Angeles, California. His original and amended income tax returns for the calendar year 1947 were filed with the then collector of internal revenue for the sixth district of California.

On January 1, 1943, the petitioner transferred to a newly formed corporation, the Flexo Manufacturing Company, Inc., (hereinafter called "corporation"), substantially all of the assets of a sole proprietorship business carried on by the petitioner under the firm name of Flexo Manufacturing Company. The assets so transferred were as follows, shown at cost:

Cash in Bank	\$ 12,704.63
Accounts Receivable	105,922.97
Inventory	55,685.71
Furniture	286.67
Machinery and Equipment	18,073.64
Auto and Equipment	3,235.30

The following liabilities and reserves were also transferred by the petitioner to the newly formed corporation:

Accounts Payable	\$10,793.54
Reserve for Federal Old Age Benefits Tax	272.40
Reserve for Federal Payroll Excise Tax	108.40
Reserve for California Unemployment Insurance Tax	503.83
California Sales Tax	6.10
Notes Payable	4,500.00
Bonus Payable	11,371.18
Reserve for Bad Debts	4,544.49
Reserve for Depreciation Machinery and Equipment	7,836.81
Reserve for Depreciation Autos and Equipment	3,235.30

The transfers of the assets, liabilities, and reserves by the petitioner to the corporation resulted in a capital contribution to such corporation, on a book basis, in the amount of \$152,737.44.

The petitioner received from the corporation, in exchange for the transfer, 120,830 shares of stock with a par value of \$1 per share, of which he transferred five qualifying shares to Robert Steele. The stock was issued on September 26, 1944. The corporation sold 4,167 shares of stock for cash to Lloyd Wallmer, making a total of 124,997 shares of stock outstanding.

An open account in petitioner's name was maintained on the books of the corporation with the heading "Accounts Receivable—C. H. Wentworth." On February 27, 1943, this account had a credit balance of \$2,197.20. On that same date the petitioner advanced \$100,000 to the corporation and received

a note in the face amount of \$100,000, maturing in one year and bearing 6 per cent interest. On April 14, 1943, the open account had a credit balance of \$3,397.20, and on the same date the petitioner advanced an additional \$100,000 to the corporation, receiving back an additional note in the face amount of \$100,000, also maturing in one year and bearing interest at 6 per cent. Both notes were carried on the corporate books as "notes payable." On December 31, 1943, the open account on the corporation's books in the petitioner's name reflected a debit balance of \$197,211.03.

On October 31, 1944, the petitioner's open account had a debit balance of \$200,742.60. The corporation on that date credited the open account with \$180,000, leaving a debit balance in the account of \$20,742.60, and at the same time charged its capital account, which resulted in a capital deficit of \$23,095.56. No charge or entry was made to the notes payable account, nor were the notes payable in the amount of \$200,000 canceled.

No income was reported by the petitioner on his individual income tax return for the calendar year 1944, or for any other year, as resulting from the credit of \$180,000 made by the corporation to his open account. The petitioner did not exchange any stock with the corporation or surrender any stock to the corporation, nor has there been any liquidation or partial liquidation of the corporation.

On December 31, 1943, the earned surplus account of the corporation showed a credit balance of

\$114,322.19, and on December 31, 1944, the credit balance in this account was \$171,920.38. The earned surplus of the corporation, on December 31, 1947, was \$82,522.06.

In May, 1947, the corporation distributed to the petitioner the sum of \$200,000. At the same time, the petitioner surrendered to the corporation the two notes of the corporation made out in 1943 and maturing in 1944. The notes payable account on the corporation's books was debited with the amount of \$200,000, and the notes were cancelled.

The ultimate question in this case is whether part of the note indebtedness was paid in years prior to 1947. The parties to the notes were the corporation, payor, and the petitioner, payee, but the payee completely controlled and dominated the payor. It is worth consideration that petitioner at all times had the power to cast any transaction with the corporation in a form most favorable to him. The basic question of whether the notes were partly paid in prior years is one of fact—what the parties actually did in those prior years. Bookkeeping is the recording of action taken so, ordinarily, the bookkeeping entry establishes the fact of the action taken. But bookkeeping entries are not conclusive. *Helvering v. Midland Mutual Life Insurance Co.*, 300 U.S. 216. The evidentiary value of a bookkeeping entry is further weakened when it obviously is one that is strange to accepted bookkeeping practice.

The Commissioner had a right to examine the actions of the parties to the notes for any year after they were executed to see if in fact the note indebtedness was partly paid. Here he examines the actions of the parties to the notes in the year 1944 at a time when, admittedly, the payor of the notes paid the payee, petitioner, \$180,000. This he had a right to do and petitioner's argument that he is opening up a year that is barred by the statute of limitations is without merit. The commissioner is not seeking to tax petitioner with any income he might have received that year. He is merely examining a transaction that occurred that year to see whether or not it resulted in payment of part of the note indebtedness.

The whole case comes down to the effect that is to given to the transaction of October 31, 1944, whereby the corporation credited taxpayer's open account with \$180,000. The petitioner here asserts this \$180,000 credit was, to the extent of the payment out of earned surplus (\$171,920.38), a dividend distribution to him. The respondent asserts it was a credit on the corporation's note indebtedness of \$200,000 to petitioner. The determination as to who is right with respect to this 1944 transaction will decide the case. If the petitioner is right then the 1947 payment to him of \$200,000 merely repaid his loan. If the respondent is right, the \$200,000 loan was paid down to \$20,000 by the \$180,000 credit in 1944, so the 1947 payment of \$200,000 was, to the extent of the earned surplus (\$82,522.06), income.

Petitioner argues he and the corporation "elected to treat said charge of said \$180,000, as a return of capital" though he admits such treatment would result in the payment of a taxable dividend to him under section 115 of the Internal Revenue Code of 1939. Respondent argues it was "obviously erroneous" to charge the capital account with this \$180,000 credit payment; that such an offsetting entry in the capital account would have been proper only if it represented redemption of stock or was the result of a liquidation or partial liquidation of the corporation. Petitioner admits there was no cancellation of stock or planned liquidation involved and he does not seem to defend the offsetting entry in the capital account as being proper under good accounting practice. He admits the \$180,000 credit had to be treated as a distribution of earned surplus to him or as a payment on his notes. He argues it cannot be treated as payment on the notes because no offsetting entry was made in the note account. His argument is it was the distribution of earned surplus to him, or, in other words, a dividend distribution.

Since the offsetting entry—the debit to the capital account—does not clearly reflect what actually occurred, we have a right to look at other facts, and the actions of the parties to the note obligations. Petitioner asserts the credit was a dividend distribution. But this corporation, almost wholly-owned and controlled by petitioner, had never declared any dividends. There was another stock-

holder holding 4,167 shares, who received nothing if the major portion of the \$180,000 credit is called a dividend. While there is no need that a dividend distribution be pro rata among stockholders, the fact that a payment is made to one and not the others militates against its being called a dividend when it can fairly be explained it is not.

Both of the \$100,000 notes were past due at the time the \$180,000 credit was made. These two notes appear to be the corporation's only indebtedness to petitioner. In any controversy between the parties to the notes there would be a presumption that any payment by the payor to the payee was to apply on the outstanding indebtedness.

Now let us look at the actions of the payee, the petitioner, at the time he received this \$180,000 credit from the payor of the notes. Do his actions show he treated it as a distribution of dividends? Clearly they do not. He did not report it as dividend income in his income tax return for 1944. All of his actions are consistent with the receipt of the \$180,000 as payment on his notes and inconsistent with his treatment of the payment as income to him.

In *Crane v. Commissioner*, 68 F. 2d 640, there was involved the right of the taxpayer to the benefit of an expenditure made by his lessee when the taxpayer failed to report or to pay a tax in the appropriate year or years upon income received by virtue of the lessee's expenditure. In the course of the opinion, it is stated:

This obligation to report and pay a tax was never performed, and cannot now be enforced against the petitioner, because it is barred by the statute of limitations. The petitioner urges that he is entitled to the benefit of the statute of limitations, and so he is. The obligation can no longer be enforced. But the failure, however innocent, to report this income, constituted in effect a statement that no such income was received, * * *.

As stated earlier, we have a right to consider the fact that petitioner was the president of and controlled the corporation. If he had wanted the books to show a dividend payment to him he could have caused the books to show the usual entries that record distribution of dividends. We are not so naive as to think petitioner would ever claim the unclear book entries show a dividend distribution to him, were it not for the fact the income tax on such distribution is now barred.

There is nothing in the record to show petitioner was unfamiliar with the income tax laws. Presumably he paid income tax on the earnings of his business in the years prior to 1943. He in effect incorporated his going business in 1943 and he wants us to conclude the next year he took \$171,920.38 worth of earnings from his business and paid no tax. We only treat the \$180,000 credit as he, by his actions, showed he treated it when we hold it was payment on the notes and not a taxable transaction.

Under all of the special facts of this case we find the petitioner did receive payment on his

notes in the sum of \$180,000 on October 31, 1944. Therefore the distribution of \$200,000 in 1947 to the petitioner resulted in a taxable dividend to him of \$82,522.06, the amount of the corporation's earnings and profits at the end of that year.

Reviewed by the Court.

Decision will be entered for the respondent.

Murdock, J., dissenting.

Labored reasoning is used in the prevailing opinion to bail out the Commissioner after the statute of limitations has run against an earlier year in which he should have taken the action which he is now taking. The courts have held repeatedly against that. *Ross v. Commissioner*, 169 F. 2d 483; *Commission v. Dwyer*, 203 F. 2d 522, 524; *Richard K. Mellon*, 12 T.C. 90, 110; *American Light & Traction Co.*, 42 B.T.A. 1121, *affd.* 125 F. 2d 365; *Tide Water Oil Co.*, 29 B.T.A. 1208; *James Couzens*, 11 B.T.A. 1040.

The petitioner advanced \$200,00 to the corporation, received the notes of the corporation for that amount and held those notes until the corporation repaid him \$200,000 in 1947, at which time the notes were canceled. Thus in form and in the accounting by the corporation these were bona fide loans which were paid off in 1947. The question then would be what justification is there for disregarding the form of these transaction to hold that the substance was entirely different. The corporation carried a per-

sonal account on its books under the petitioner's name which at times had a credit balance and at other times had a debit balance. The debit balance in 1944 was slightly in excess of \$200,000. The corporation at that time credited \$180,000 to that account of the petitioner on its books and at the same time debited capital. The opinion holds contrary to the evidence, that the \$180,000 was a payment on the notes. The Commissioner, if he had any doubt about that crediting, should have held for that year that it was the equivalent of the distribution of a taxable dividend. He would undoubtedly prefer that position if both years were open, for in that year the earnings available for a dividend were far in excess of the earnings available in 1947. The petitioner's failure to report the taxable dividend for 1944 was not a misrepresentation, since at most that would have been his own interpretation of the law. *Commissioner v. American Light & Traction Co.*, supra; *Ross v. Commissioner*, supra. We should not hold that there was a distribution of a taxable dividend in 1947 merely because the Commissioner now finds it too late to go back to 1944.

Served March 13, 1956.

The Tax Court of the United States
Washington

Docket No. 51260

C. H. WENTWORTH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed March 12, 1956, it is

Ordered and Decided: That there is a deficiency in income tax of \$60,902.38 for the calendar year 1947.

/s/ JOHN E. MULRONEY,
Judge.

[Entered]: March 14, 1956.

Served March 16, 1956.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 51260

C. H. WENTWORTH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

Taxpayer, the petitioner in this cause, C. H. Wentworth, by Eric L. Burton, Counsel, hereby files his petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States rendered on March 14, 1956, 25 T. C. No. 139, determining a deficiency in petitioner's Federal income tax for the calendar year 1947 in the amount of \$60,902.38, and respectfully shows:

I.

Statement of Facts

1. The tax return in question was filed in California and petitioner resides and all of the facts involved in this case occurred within said State; the case was heard in Los Angeles, California.

2. On January 1, 1943, petitioner transferred assets, having a book value of \$152,737.44, to the corporation in exchange for its capital stock. Said

net assets were substantially all the assets of a sole proprietorship business theretofore carried on by petitioner under the firm name and style of Flexo Manufacturing Co.

3. Petitioner maintained an open account on the books of the corporation to which were charged against him any amounts paid to petitioner or to third parties for the account of the petitioner. On December 31, 1943, on this open account, petitioner was indebted to the corporation in the amount of \$197,211.03. On October 31, 1944, petitioner was indebted to the corporation on said open account in the sum of \$200,742.60.

4. As of February 27, 1943, the petitioner advanced to the corporation the sum of \$100,000.00 and received from the corporation its promissory note in the amount of \$100,000.00, bearing interest at the rate of 6% per annum. On April 14, 1943, the petitioner advanced the corporation an additional \$100,000.00 and received another promissory note for this amount bearing interest at the rate of 6% per annum. Both notes were carried on the corporation's books at Notes Payable, in a separate account, this note payable account was distinct and separate from petitioner's "Open Account."

5. On October 31, 1944, on the accounting records of the corporation, petitioner's open account was credited with \$180,000.00, leaving a balance owing to the corporation by petitioner in the sum of \$20,742.60 and a like amount of \$180,000.00 was

charged to the capital stock account with a result in capital deficit of \$23,095.56. No charge or entry was made, on the corporation's accounting records, to the Notes Payable Account due petitioner and the notes in the amount of \$200,000.00 were not cancelled. As of December 31, 1944, the balance sheet of petitioner showed a debit balance of the capital stock account of \$23,095.56 while the earned surplus account showed a credit balance of \$171,920.38, making a total net worth of \$148,824.82.

6. No income was reported by the petitioner on his individual income tax returns as a result of the credit of the corporation to his open account of \$180,000.00; but rather petitioner treated it as a return of capital, thus reducing the cost basis of his stock and postponing the profit on such distribution to the time when petitioner sold his capital stock or to when the corporation was dissolved and its assets distributed to its stockholders.

7. In May, 1947, the corporation paid the petitioner the sum of \$200,000.00 at which time the notes were still in the possession of the petitioner and were, upon such payment, surrendered to the corporation and cancelled. The accounting records of this corporation, prior to the payment, still reflected notes payable to the petitioner in the amount of \$200,000.00 until such payment in May, 1947, at which time said payment was offset against the notes payable account on the books of the corporation.

II.

Nature of the Controversy

This case involves the question of whether the payment to petitioner in May of 1947, of the sum of Two Hundred Thousand Dollars (\$200,00.00) from one Flexo Manufacturing Co., Inc., a corporation, was in payment of notes payable or a distribution of capital and taxable dividends to the extent of earnings and profits for that year.

III.

1. The findings of fact by the Tax Court are not supported by substantial evidence; all of the evidentiary facts are stipulated and uncontroverted to the effect that the payment by the corporation to petitioner of \$200,000.00 in 1947 was in form and substance repayment of loans and treated and regarded as such by the parties to the transaction.

2. The ultimate findings of the Tax Court, drawn from uncontroverted and stipulated facts, is erroneous in law.

3. The decision is wrong for the reason that it is in essence an attempt to reopen a tax year (1944) barred by the statute of limitations.

4. The said petitioner, being aggrieved by the findings of fact and conclusions of law contained in the said findings and opinion of the Court, and by its decision entered thereto, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

Wherefore, petitioner respectfully requests that the decision be reviewed by the United States Court of Appeals for the Ninth Circuit; that the said decision of the Tax Court of the United States be reversed and/or the case remanded and that the Clerk of the Tax Court of the United States give such notices and do such things as shall be necessary to perfect this petition.

/s/ ERIC L. BURTON,
Counsel for Petitioner.

Received and Filed June 7, 1956, T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States do hereby certify that the foregoing documents, 1 to 16, inclusive, constitute and are all of the original papers and proceedings, including Joint Exhibits 1-A thru 10-J, attached to Stipulation of Facts, on file in my office as called for by the "Designation of Contents of Record on Review" in the proceeding before the Tax Court of the United States entitled: "C. H. Wentworth, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 51260," and in which the petitioner in the Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax

Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 3rd day of July, 1956.

[Seal] /s/ HOWARD P. LOCKE,
Clerk the Tax Court of the
United States.

[Endorsed]: No. 15207. United States Court of Appeals for the Ninth Circuit. C. H. Wentworth, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed: July 16, 1956.

Docketed: July 24, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS

Petitioner intends to rely on the following points:

1. The findings of fact by the Tax Court are not supported by substantial evidence; all of the evidentiary facts are stipulated and uncontroverted to the effect that the payment by the corporation to Petitioner of \$200,000.00 in 1947 was in form and substance repayment of loans and treated and regarded as such by the parties to the transaction.

2. The ultimate findings of the Tax Court, drawn from uncontroverted and stipulated facts, is erroneous in law.

3. The evidentiary facts being fully stipulated by the parties before the Tax Court, it is a question of law as to whether the ultimate findings of the Tax Court herein are correct.

4. The decision is erroneous for the reason that it is in essence an attempt to reopen a tax year (1944) barred by the statute of limitations.

/s/ ERIC L. BURTON,
Counsel for Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 31, 1956, U.S.C.A.

No. 15207

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. WENTWORTH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

BURTON & GAULDIN,

By ERIC L. BURTON,

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125 North Bright Avenue,

Whittier, California,

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FILED

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PAUL P. O'BRIEN, CLERK



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No. 15207

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. WENTWORTH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

Preliminary Statement.

Petitioner seeks to have reviewed by this Court a decision of the Tax Court of the United States determining a deficiency in income tax for the taxable year ended December 31, 1947, in the amount of \$60,902.38. All of the evidentiary facts were stipulated to by the parties before the Tax Court, no further evidence being introduced at the time of trial. The sole issue presented is whether or not the stipulated evidentiary facts support a finding that a payment received by Petitioner from a corporation in 1947 constituted the payment of notes receivable, as contended by Petitioner, or constituted a dividend to the extent of corporate earnings, as contended by the Respondent.

The Record Below.

The entire record herein, except the ultimate finding of the Tax Court, was stipulated to by the parties and as this stipulation is one of the Exhibits before this Court, Petitioner will not recite at length all of the facts therein but will refer briefly to the salient happenings leading to this litigation.

On January 1, 1943, Petitioner transferred to Flexo Manufacturing Co., Inc., hereinafter referred to as "corporation," substantially all of the assets, liabilities and reserves of his sole proprietorship business in the amount of \$152,737.44, book basis. Petitioner received 120,830 shares of stock and transferred 5 shares to a Mr. Steele, and the corporation sold 4,167 shares for cash to a Mr. Wallmer. On February 27, 1943, Petitioner loaned to the corporation the sum of \$100,000.00 and received back its promissory note payable in one year at 6% interest. On April 14, 1943, an additional loan of \$100,000.00 was made to the corporation by Petitioner and a similar note taken back, maturing in one year at 6% interest. The corporation carried an open account on its books in the Petitioner's name which, on December 31, 1943, showed a debit balance of \$197,211.03. Both notes were carried on the corporate books as "notes payable." On October 31, 1944, the corporation credited the open account with \$180,000.00, leaving a debit balance of \$20,742.60, and at the same time charged its capital account resulting in a capital deficit of \$23,095.56. The notes payable account was not disturbed and the notes were not surrendered. In May, 1947, Petitioner received the sum of \$200,000.00 from the corporation and surrendered to the corporation the two promissory notes and the notes payable account was debited and the notes cancelled.

From these facts, the Tax Court found that the credit to the accounts receivable account in 1944 “worked a corresponding offset” in the notes payable account resulting in a corporate distribution in 1947 to the extent of earnings and profits in that year.

The Stipulated Facts Conclusively Show That the Notes Were Paid in 1947.

It is self-evident from the facts agreed to by the parties that the real intention of Petitioner and the corporation was that the notes be paid by the 1947 payment. Every fact in the record substantiates this conclusion. Promissory notes were issued to Petitioner in consideration of the two \$100,000.00 loans and a notes payable account entered on the books of the corporation. Upon receiving payment of the amounts due on the notes in 1947, Petitioner surrendered them to the corporation which, in turn, debited its notes payable account. Thus, all of the direct and critical circumstances related to the transaction lead cleanly to the conclusion that the parties intended and treated the payment in 1947 as on the notes. Petitioner submits that this is an obvious and simple deduction.

The rationale of the majority opinion of the Tax Court is that the receipt by Petitioner of \$180,000.00 in 1944, which was charged to the corporation’s capital account, was really intended by Petitioner and the corporation as a payment on the notes. In order to reach this position, it is necessary for the Tax Court to disregard the form in which both the 1944 and the 1947 payments were cast and to disregard the fact that the notes remained outstanding until cancelled upon the payment in 1947. Boiled down, the Tax Court’s opinion hinges on the fact that

Petitioner paid no tax on the payment in 1944, and on the assumption that Petitioner *actually* knew that, if such were a return of capital, some tax would be payable. Petitioner submits, in agreement with the dissenting opinion below, that at most the failure to report a taxable dividend for the year 1944 showed that Petitioner did not understand the tax consequences of a return of capital in the amount received. Petitioner's tax treatment of the 1944 payment is at the very most equivocal in support of the Tax Court's finding. There was nothing equivocal, however, in the manner in which the 1944 payment was reflected by the corporation's books. It was shown to be a return of capital and nothing else.

Thus we see ranged on the one hand, all of the usual indicia of payment to indicate the notes were retired in 1947, and on the other hand, to indicate payment in 1944, a questionable supposition based upon an equivocal fact.

It is to belabor the obvious to restate that all of the substantial and uncontroverted evidence in the record is in support of Petitioner and that there is no substantial evidence in support of the majority opinion reached by the Tax Court.

The case should be remanded for action favoring Petitioner's contentions.

Fed. Rules of Civ. Proc., Sec. 52(a);

Wright-Bernet, Inc. v. Comm., 172 F. 2d 343 (1949).

The Holding Below Allows the Commissioner to Open a Year Barred by the Statute of Limitations.

Judge Murdock, dissenting, stated:

“Labored reasoning is used in the prevailing opinion to bail out the Commissioner after the statute of limitations has run against an earlier year in which he should have taken the action which he is now taking.” [Tr. of Record p. 24.]

Petitioner respectfully submits that it is again self-evident that the thrust of the Tax Court's holding is to obtain tax revenue from the transaction in 1944 although it is barred by the Statute of Limitations. This is contrary to law.

Ross v. Commissioner, 169 F. 2d 483;

Commissioner v. Dwyer, 203 F. 2d 522, 524;

Richard K. Mellon, 12 T. C. 90, 110;

American Light & Traction Co., 42 B. T. A. 1121,
aff'd 125 F. 2d 365;

Tide Water Oil Co., 29 B. T. A. 1208;

James Couzens, 11 B. T. A. 1040.

The Holding of the Tax Court Exceeds Its Authority.

Petitioner respectfully submits that the underlying premise of the Tax Court's opinion is that the notes were paid by *operation of law* and for *tax purposes* in 1944 contrary to and in the face of the real intention of the parties to have payment in 1947. Substance must prevail over form for the Government as well as the taxpayer and there is no legal basis for the Government to avoid the substance of the transaction herein.

Weiss v. Stearn, 262 U. S. 242, 68 L. Ed. 1001,
44 S. Ct. 490 (1924).

A careful reading of the majority opinion will reveal that the Tax Court never actually states that the parties *intended* the payment in 1944 to be on the notes. To be sure, the holding is that the 1944 payments are *to be treated* as against the notes, but there is a scrupulous avoidance of any expression that the parties so intended. Even the headnote of the holding states that “. . . under these circumstances the credit to the accounts receivable account in 1944 *worked a corresponding offset* in the notes payable account . . .” [Tr. of Record, p. 15 (emphasis added).]

This brings into play some theory of equity or estoppel or operation of law not argued by the Government, not expressed by the Court nor supported by the law. As expressed by the Court itself, the turning question is “. . . what the parties actually did . . .” [Tr. of Record, p. 19.]

One further point will serve to illuminate this contention. Suppose the taxable nature of the 1944 payment were the only issue before the Court. Does it seem possible that the Petitioner could, on the facts agreed to, successfully urge that the 1944 payment constituted note payments? It is readily apparent that the Government would most certainly tax it as a corporate dividend and Petitioner would be powerless to argue that he did not actually receive note payments in 1947.

If the Court agrees with this analysis of the taxable nature of the 1944 payment, then it follows that the Tax Court has improperly tied together two unrelated trans-

actions by some silent doctrine and that its findings must be overturned.

Union Pacific R.R. Co. v. Comm., 32 B. T. A. 383 (1935);

Wobber Bros. v. Comm., 35 B. T. A. 890 (1937);

Grauman's Greater Hollywood Theatre, Inc. v. Comm., 37 B. T. A. 448 (1938);

Salvage v. Comm., 76 F. 2d 112 (1935), aff'd 297 U. S. 106.

Conclusion.

The issue in this case is very simple. Were the notes paid in 1947? All of the direct evidence would indicate that they were. Both the payee and the payor acted in support of this assertion by (1) surrendering the notes, and (2) debiting the notes payable account, respectively, in 1947. The most powerful evidence of payment necessarily is whether the instrument has been surrendered and, secondly, how the payor treated the payment on his books or records.

The corollary issue present is whether payment was made in 1944. It should be noted that although \$180,000.00 was paid, neither note was surrendered nor was the note account debited. The evidence shows that both Petitioner and the corporation regarded the 1944 payment as a return of capital and that they most certainly did not intend or regard it as being against the notes.

The entire theory of the Tax Court ruling is based upon a questionable inference drawn from Petitioner's tax treatment of the 1944 payment. If the evidence was more

divided than it is, perhaps this inference could determine the case, but it stands alone against all of the other stipulated facts.

Petitioner respectfully submits that the real purport of the Tax Court ruling is to tax the 1944 transaction *i. e.*, "He in effect incorporated his going business in 1943 and he wants us to conclude the next year he took \$171,920.38 worth of earnings from his business and paid no tax." [Op. of Tax Court, Tr. of Record, p. 23.] But to do this the Court must ignore the demonstrated intentions of the parties and utilize an operation of law or constructive payment doctrine which is not supported by legal principle.

In the scope of review given here and in regard to the weight to be given the finding below, it should be kept in mind that all of the evidence is as plainly before this Court as it was before the Tax Court. There were no witnesses, one more believable than another. All of the facts are stipulated and it remains only to weigh them and determine which preponderates.

Petitioner submits that the evidence clearly substantiates his contentions and that there is no substantial evidence in support of the Tax Court's ruling which should be, accordingly, remanded.

Respectfully submitted,

BURTON & GAULDIN,

By ERIC L. BURTON,
R. JACKSON GAULDIN,

Attorneys for Petitioner.

No. 15207

**In the United States Court of Appeals
for the Ninth Circuit**

C. H. WENTWORTH, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT
OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

CHARLES K. RICE,
Assistant Attorney General.

**LEE A. JACKSON,
A. F. PRESCOTT,
S. DEE HANSON,**

*Attorneys,
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FILED

DEC 22 1956

PAUL P. O'BRIEN, CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15207

C. H. WENTWORTH, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT
OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 15-25) are reported in 25 T. C. 1210.

JURISDICTION

The taxpayer's petition for review involves a deficiency in individual income tax in the total sum of \$60,902.38, as determined and asserted by the Commissioner for the taxable year 1947. (R. 3, 27-31). On August 24, 1953, the Commissioner mailed a statutory notice of such deficiency to the taxpayer. R. 6-9.) Within 90 days thereafter, on November 16, 1953, the taxpayer, pursuant to Section 272 of the Internal Revenue Code of 1939, filed a petition in the Tax Court for redetermination of this deficiency. (R. 3,

4-9). The decision of the Tax Court was entered on March 14, 1956. (R. 3, 26.) On June 7, 1956, the taxpayer filed his petition for review invoking the jurisdiction of this Court under Section 7482 of the Internal Revenue Code of 1954. (R. 3, 27-32.)

QUESTION PRESENTED

The taxpayer's corporation in 1944 credited the accounts receivable account of the taxpayer, its controlling stockholder, for \$180,000, and debited its capital account for the same amount. Its earned surplus account showed a credit balance of \$171,920.38 on December 31, 1944, and a credit balance of \$82,522.06 at the end of the taxable year 1947. The corporation was indebted to the taxpayer on two \$100,000 notes, both overdue and payable at the time this particular credit was made in 1944 to his accounts receivable account on its books.

The question presented is whether the Tax Court correctly held upon these facts that the corporation's credit to the taxpayer's accounts receivable account in 1944 effected in turn a corresponding offset in the corporation's notes payable account, representing its notes then overdue and owing to the taxpayer and, therefore, the corporate distribution of \$200,000 received by the taxpayer in 1947 constituted a taxable dividend to the extent of the corporation's earnings and profits in that year, instead of the payment by the corporation on its note indebtedness to him, as the taxpayer contends.

STATUTE AND REGULATIONS INVOLVED

These are printed in the Appendix, *infra*.

STATEMENT

The facts, as stipulated (including exhibits) (R. 11-14), were found by the Tax Court accordingly, substantially as follows (R. 16-19):

The taxpayer is an individual with a principal office at 1700 East Olympic Boulevard, Los Angeles, California. His original and amended income tax returns for the calendar year 1947 were filed with the then Collector of Internal Revenue for the Sixth District of California. (R. 16.)

On January 1, 1943, the taxpayer transferred to a newly formed corporation, the Flexo Manufacturing Company, Inc. (hereinafter called "corporation"), substantially all of the assets of a sole proprietorship business carried on by the petitioner under the firm name of Flexo Manufacturing Company. The assets so transferred were as follows, shown at cost (R. 16):

Cash in Bank-----	\$12, 704. 63
Accounts Receivable-----	105, 922. 97
Inventory-----	55, 685. 71
Furniture-----	286. 67
Machinery and Equipment-----	18, 073. 64
Auto and Equipment-----	3, 235. 30

The following liabilities and reserves were also transferred by the taxpayer to the newly formed corporation (R. 17):

Accounts Payable-----	\$10, 793. 54
Reserve for Federal Old Age Benefits Tax-----	272. 40
Reserve for Federal Payroll Excise Tax-----	108. 40
Reserve for California Unemployment Insurance Tax-----	503. 83
California Sales Tax-----	6. 10
Notes Payable-----	4, 500. 00
Bonus Payable-----	11, 371. 18
Reserve for Bad Debts-----	4, 544. 49
Reserve for Depreciation Machinery and Equipment-----	7, 836. 81
Reserve for Depreciation Autos and Equipment-----	3, 235. 30

The transfers of the assets, liabilities and reserves by the taxpayer to the corporation resulted in a capi-

tal contribution to such corporation, on a book basis, in the amount of \$152,737.44. (R. 17.)

The taxpayer received from the corporation, in exchange for the transfer, 120,830 shares of stock with a par value of \$1 per share, of which he transferred five qualifying shares to Robert Steele. The stock was issued on September 26, 1944. The corporation sold 4,167 shares of stock for cash to Lloyd Wallmer, making a total of 124,997 shares of stock outstanding. (R. 17.)

An open account in taxpayer's name was maintained on the books of the corporation with the heading "Accounts Receivable—C. H. Wentworth." On February 27, 1943, this account had a credit balance of \$2,197.20. On that same date the taxpayer advanced \$100,000 to the corporation and received a note in the face amount of \$100,000, maturing in one year and bearing 6% interest. On April 14, 1943, the open account had a credit balance of \$3,397.20, and on the same date the taxpayer advanced an additional \$100,000 to the corporation, receiving back an additional note in the face amount of \$100,000, also maturing in one year and bearing interest at 6%. Both notes were carried on the corporate books as "notes payable." On December 31, 1943, the open account on the corporation's books in the taxpayer's name reflected a debit balance of \$197,211.03. (R. 17-18.)

On October 31, 1944, the taxpayer's open account had a debit balance of \$200,742.60. The corporation on that date credited the open account with \$180,000, leaving a debit balance in the account of \$20,742.60, and at the same time charged its capital account, which

resulted in a capital deficit of \$23,095.56. No charge or entry was made to the notes payable account, nor were the notes payable in the amount of \$200,000 canceled. (R. 18.)

No income was reported by the taxpayer on his individual income tax return for the calendar year 1944, or for any other year, as resulting from the credit of \$180,000 made by the corporation to his open account. The taxpayer did not exchange any stock with the corporation or surrender any stock to the corporation, nor has there been any liquidation or partial liquidation of the corporation. (R. 18.)

On December 31, 1943, the earned surplus account of the corporation showed a credit balance of \$114,322.19, and on December 31, 1944, the credit balance in this account was \$171,920.38. The earned surplus of the corporation, on December 31, 1947, was \$82,522.06. (R. 18-19.)

In May, 1947, the corporation distributed to the taxpayer the sum of \$200,000. At the same time, the taxpayer surrendered to the corporation the two notes of the corporation made out in 1943 and maturing in 1944. The notes payable account on the corporation's books was debited with the amount of \$200,000, and the notes were canceled. (R. 19.)

On the basis of these facts, the Tax Court, sustaining the Commissioner's determination (R. 6-9), held that the corporation's payment to the taxpayer by the credit to his accounts receivable account in 1944 effected a corresponding offset in its notes payable account representing its note indebtedness then overdue and owing the taxpayer, and therefore the cor-

porated distribution of \$200,000 to the taxpayer in the taxable year 1947 was a taxable dividend to the extent of its earnings and profits in that year, and not the payment by the corporation of its note indebtedness to him (R. 19-24). The Tax Court thereupon entered its decision accordingly (R. 26), from which the taxpayer petitioned this Court for review (R. 27).

SUMMARY OF ARGUMENT

To support his contention that the Commissioner and the Tax Court erred, taxpayer relies solely upon entries made upon the books of the corporation of which taxpayer was the principal stockholder, and which he dominated and controlled. The undisputed facts show that the book entries are totally unreliable; and the Tax Court was fully justified in finding upon the agreed facts that the corporation's one-year notes given to taxpayer in 1943 were paid off by the corporation in 1944 to the extent of \$180,000, the amount by which taxpayer's open account was credited on its books at a time when the notes were due. Hence, it follows that the notes could not have been paid off in 1947, as the taxpayer contends.

ARGUMENT

The cancellation of the taxpayer's indebtedness to his controlled corporation in 1944 effected in fact the cancellation in like amount of the corporation's note indebtedness then owing, overdue and payable to him, and therefore the corporate distribution to the taxpayer in 1947 constituted a taxable dividend to him, and not the repayment of loans

The sole question presented for decision is whether the \$200,000 distribution received by the taxpayer in

the taxable year 1947 from his corporation of which he was the controlling and dominating stockholder constituted a taxable dividend to him to the extent of the corporation's earnings and profits at the end of that year, or was in payment of two notes of the corporation for \$100,000 each which were given him in 1943, and which were overdue in 1944 when an entry was made upon the corporation's books crediting taxpayer's open account with \$180,000.

The question actually narrows itself to one of whether the \$180,000 credit to the taxpayer on the corporate books in 1944 was in reality a distribution to him of earned surplus. The taxpayer admitted below (R. 21), and at least tacitly admits here, that this credit in 1944 had to be treated either as a distribution of earned surplus or as a payment on the two notes. Thus, his contention here that the credit was not a payment on the notes is an assertion that it was a distribution of earned surplus in that year. To support his contention he relies solely upon the bookkeeping entries made by the corporation, a corporation which he dominated and controlled. The most cursory examination of the admitted facts shows that the bookkeeping entries were unreliable. As of October 31, 1944, the corporation credited taxpayer's accounts receivable account with \$180,000, and in turn debited its *capital account* in the same amount, thereby admittedly improperly effecting a capital deficit exceeding \$23,000 on its books. There is no showing that the corporation declared any dividends, and the taxpayer reported no income on his returns

as resulting from the transaction. The offsetting entry in the capital account would have been proper only if it represented a redemption of stock or as a result of a liquidation or partial liquidation of the corporation. Taxpayer admitted that there was no cancellation of stock or planned liquidation. At the time these entries were made the taxpayer owed the corporation \$200,742.60 (R. 18); and taxpayer held two *overdue* notes of the corporation, each for \$100,000.

Bookkeeping entries are not conclusive. *Helvering v. Midland Ins. Co.*, 300 U. S. 216; *Doyle v. Mitchell Brothers Co.*, 247 U. S. 179, 187; *Royal Packing Co. v. Lucas*, 38 F. 2d 180 (C. A. 9th). Yet, taxpayer's case is bottomed upon the bookkeeping entries above referred to, and especially upon a negative entry. That is, that no charge or entry was made to the notes payable account to taxpayer; and the fact that the notes were not cancelled in 1944. However, in view of the taxpayer's domination of the corporation, the unreliability of the book entries, the fact that the taxpayer returned none of the \$180,000 as income in 1944, the fact that the corporation was indebted to taxpayer and the taxpayer to the corporation, and the fact that the corporation had never declared a dividend, it seems clear the Tax Court was fully justified in finding the entries unreliable and in finding that the credit in 1944 was not intended as a distribution of earned surplus. As the Tax Court said (R. 23):

If he had wanted the books to show a dividend payment to him he could have caused the books

to show the usual entries that record distribution of dividends. We are not so naive as to think petitioner would ever claim the unclear book entries show a dividend distribution to him, were it not for the fact the income tax on such distribution is now barred.

The Tax Court's finding that the credit was not a dividend, upon the taxpayer's own admission, leaves as the only alternative the conclusion that it was intended as a payment toward the notes. Indeed, in an arms-length transaction, it is difficult to conceive why a corporation, while owing a stockholder \$200,000, would credit that stockholder with \$180,000 toward \$200,000 which the stockholder owed to it. It certainly would serve no corporate business purpose. Nor can one find any business purpose in the corporation's debit of its capital account (to a minus) at a time when the corporation had a large earned surplus. Clearly, the bookkeeping entries are unreliable, and the Tax Court was fully justified in taking into consideration admitted facts in making its finding that the credit was a payment on the corporation's notes payable to taxpayer. See *Fisher v. Commissioner*, 7 B. T. A. 968. Cf. *Gulf Oil Corp. v. Lewellyn*, 248 U. S. 71.

We submit the Tax Court's ruling is not based upon any theory of equity or estoppel. In the circumstances of this case, when dealing with totally unreliable book entries made in transactions between the corporation and the taxpayer, who controlled it, we submit the fact that the taxpayer did not report any part of the \$180,000 credited to him in 1944, is itself

evidence that he did not intend that it be a distribution of dividends to him in that year. And we believe that the Tax Court properly considered this as a fact with other admitted facts in reaching its conclusion. That the Tax Court considered it as a fact is made clear from the following excerpts from its opinion, where it found (R. 21-22):

Since the offsetting entry—the debit to the capital account [in 1944]—does not clearly reflect what actually occurred, we have a right to look at other facts * * *. * * * this corporation, almost wholly-owned and controlled by petitioner, had never declared any dividends. There was another stockholder holding 4,167 shares, who received nothing if the major portion of the \$180,000 credit is called a dividend. * * * the fact that a payment is made to one and not the others militates against its being called a dividend when it can fairly be explained it is not.

* * * * *

Do his [taxpayer's] actions show he treated it [\$180,000 credit in 1944] as a distribution of dividends? Clearly they do not. He did not report it as dividend income in his income tax return for 1944. All of his actions are consistent with the receipt of the \$180,000 as payment on his notes [in 1944] and inconsistent with his treatment of the payment as income to him.

Further (R. 23-24):

There is nothing in the record to show petitioner was unfamiliar with the income tax laws. * * * and he wants us to conclude the next year [after incorporation] he took \$171,920.38 worth

of earnings from his business and paid no tax. * * *

Under all of the special facts of this case we find the petitioner did receive payment on his notes in the sum of \$180,000 on October 31, 1944. Therefore the distribution of \$200,000 in 1947 to the petitioner resulted in a taxable dividend to him of \$82,522.06, the amount of the corporation's earnings and profits at the end of that year.

These findings are entitled to finality where, as here, they are supported by substantial evidence and are not shown by the taxpayer to be clearly erroneous. *United States v. Gypsum Co.*, 333 U. S. 364, 394-395, rehearing denied, 333 U. S. 869. "Here, the decision below was consistent with the findings which on the evidence were well within the province of the trier" of the facts. *Chesbro v. Commissioner*, 225 F. 2d 674 (C. A. 2d).

Although, as above demonstrated, the Tax Court did not treat the fact that the taxpayer returned no income from the 1944 transaction as an estoppel or anything in the nature thereof, but merely as a fact to be considered with other facts, it should be pointed out that there is reputable authority for the proposition that by failing to report he thereby declared, in effect, that no income had been received by him. *Crane v. Commissioner*, 68 F. 2d 640, 641 (C. A. 1st); *Bothwell v. Commissioner*, 77 F. 2d 35 (C. A. 10th); *Fordyce v. Helvering*, 78 F. 2d 525 (C. A. 8th). And see *Ross v. Commissioner*, 169 F. 2d 483, 495 (C. A. 1st), wherein in an opinion written by Mr. Justice

Frankfurter, sitting as a circuit justice, the *Crane* case was approved and distinguished.

Viewing the situation here from the standpoint of substance, as we must in determining questions of federal taxation (*Weiss v. Stearn*, 265 U. S. 242), we submit that the Tax Court was correct in concluding that the \$180,000 bookkeeping credit in 1944 was not a distribution of earnings, but was a payment to the taxpayer on his then overdue notes of \$200,000.

CONCLUSION

The decision of the Tax Court is correct and should therefore be affirmed by this Court.

Respectfully submitted.

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DECEMBER, 1956.

A P P E N D I X

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(a) *Distributions by Corporations.*—Distributions by corporations shall be taxable to the shareholders as provided in section 115.

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) [As amended by Sec. 166, Revenue Act of 1942, c. 619, 56 Stat. 798] *Definition of Dividend.*—The term "dividend" when used in this chapter (except in section 201 (c) (5), section 204 (c) (11) and section 207 (a) (2) and (b) (3) (where the reference is to dividends of insurance companies paid to policy holders)) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), with-

out regard to the amount of the earnings and profits at the time the distribution was made.

(b) *Source of Distributions*.—For the purposes of this chapter every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. Any earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913, may be distributed exempt from tax, after the earnings and profits accumulated after February 28, 1913, have been distributed, but any such tax-free distribution shall be applied against and reduce the adjusted basis of the stock provided in section 113. * * *

(c) [As amended by Sec. 147, Revenue Act of 1942, *supra*] *Distributions in Liquidation*.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. In the case of amounts distributed (whether before January 1, 1939, or on or after such date) in partial liquidation (other than a distribution to which the provisions of subsection (h) of this section are applicable) the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 115.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.22 (a)-1. *What Included in Gross Income*.—Gross income includes in general compensation for personal and professional serv-

ices, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. * * *

* * * * *

SEC. 29.115-1. *Dividends*.—The term “dividend” for the purpose of chapter 1 (except when used in section 201 (c) (5), section 204 (c) (11), and section 207 (a) (2) and (b) (3) where the reference is to dividends of insurance companies paid to policyholders) comprises any distribution in the ordinary course of business, even though extraordinary in amount, made by a domestic or foreign corporation to its shareholders out of either—

(1) earnings or profits accumulated since February 28, 1913, or

(2) earnings or profits of the taxable year computed without regard to the amount of the earnings or profits (whether of such year or accumulated since February 28, 1913) at the time the distribution was made.

The earnings or profits of the taxable year shall be computed as of the close of such year, without diminution by reason of any distributions made during the taxable year. For the purpose of determining whether a distribution constitutes a dividend, it is unnecessary to ascertain the amount of the earnings and profits accumulated since February 28, 1913, if the earnings and profits of the taxable year are equal to or in excess of the total amount of the distributions made within such year.

* * * * *

A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands.

* * * * *

No. 15208

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE J. SCHAEFER,

Appellant,

vs.

MILTON L. GUNZBURG, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

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MILTON L. GUNZBURG, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

Introductory Statement.

Plaintiff appeals from a judgment below in favor of defendants, entered after a trial before the court sitting without a jury, the court having previously granted the motion of defendants to strike plaintiff's timely demand for jury trial.

The action below was brought for damages for breach of a contract to share profits. By the terms of that contract, plaintiff's complaint alleged, defendant Milton L. Gunzburg agreed to pay to plaintiff, in return for plaintiff's agreement to render certain specified services, a sum equal to 50% of the profits derived by the various defendants from a family business venture. The com-

plaint further alleged the repudiation by defendants of the agreement and their breach thereof by failure to pay plaintiff his rightful (or any) share of their profits. Because the amount of plaintiff's damages for the aforesaid breach was dependent upon the amount of the profits derived by defendants, the complaint prayed, among other things, for an accounting of such profits and a money judgment in favor of plaintiff for 50% thereof. Plaintiff timely demanded a jury trial.

That an accounting was necessary to determine the amount of defendants' profits and hence, by simple computation therefrom, the amount of plaintiff's damages, did not convert a legal action for damages for breach of contract into an equitable action for an accounting. At most, the action was then one of which law and equity had concurrent jurisdiction, and accordingly one in which plaintiff was entitled to a jury trial as a matter of right upon the issues of the making and breach of the agreement.

But even if the accounting element had imported an equitable feature into the case, that feature was eliminated by the court concurrently with its denial of the jury trial. Upon motion of defendants, the court ordered a separate trial under Rule 42(b) of the Federal Rules of Civil Procedure, limited to the disputed issues of the making, existence, terms and breach of the contract upon which plaintiff sued. The court reserved for a later and separate trial, if necessary, the issues of the amount of defendants' profits and the nature and extent of assets in which plaintiff might have an interest.

By its Order, the court thus struck completely, from the issues to be separately tried, any element of equitable cognizance. It specifically consigned to a separate trial at a later date all issues relating to accounting and other relief prayed for in the complaint. It underscored its separation of the issues into at least two distinct trials (in fact, almost two separate actions) by excluding from the scope of pre-trial discovery, as well as from the separate trial, "evidence relating to an accounting between the parties." Thus left for trial herein were only the factual issues of whether the agreement alleged by plaintiff was in fact made by the parties, the terms thereof, and whether it was breached by defendants.

The issues which were thus specified for trial and thereafter tried were entirely legal in nature, being no different from the same issues presented in any action at law for breach of contract. No issues of accounting or other possibly equitable issues were presented or even permitted by the Order. Nevertheless, and in reference to these legal issues, the court ordered that they be tried without a jury, notwithstanding plaintiff's timely demand therefor. That order, we submit, violated plaintiff's rights under the Seventh Amendment to the United States Constitution and Rule 38(a) of the Federal Rules of Civil Procedure. Since the evidence upon the crucial issues was directly conflicting and clearly sufficient to have sustained a jury verdict for plaintiff, the court's denial of his demand for a jury trial constituted prejudicial and reversible error, as we shall demonstrate.

Statement of Jurisdiction.

1. The jurisdiction of the Court of Appeals to review the judgment of the District Court is believed to be conferred by Title 28, *United States Code*, Section 1291.

2. The jurisdiction of the District Court herein is believed to be sustained by Title 28, *United States Code*, Section 1332(1).

3. The existence of jurisdiction in the District Court is shown by the allegations of the complaint that plaintiff is a citizen and resident of the State of New York, that the individual and corporate defendants are each and all citizens and residents of the State of California [R. 3-4]; and that the amount in controversy exceeds the sum of \$3,000, exclusive of interest and costs [R. 4]. The Findings of Fact are in accord with the jurisdictional allegations of the complaint [R. 101-102].

4. The final judgment from which this appeal is taken was entered on March 28, 1956 [R. 110-111]. Plaintiff served and filed his notice of appeal on April 26, 1956 [R. 111-112].

Statement of the Case.

A. The Pleadings.

1. Plaintiff's complaint, entitled "COMPLAINT FOR BREACH OF CONTRACT," alleged that plaintiff was an executive of over forty years' experience in all phases of the motion picture industry, having by reason thereof acquired a wide and extensive knowledge of the operation of the industry, and a valuable reputation for honesty and integrity throughout the entire industry, enjoying close, long-term friendly relations and contacts with most of the key personnel of that industry [R. 4-7]. Defen-

dant Milton L. Gunzburg, having a very limited experience and reputation in the industry, had in late 1950 acquired certain rights to a process for the photography and exhibition of motion pictures giving the three-dimensional illusion of depth, as well as width and height [R. 7-8].

On or about April 20, 1951, Gunzburg and plaintiff entered into an agreement by which plaintiff agreed to render his services in the business aspects of the promotion and development of the aforementioned process and in the marketing thereof and of allied and incidental rights and properties, in return for which Gunzburg agreed to pay to plaintiff one-half of all the profits which should thereafter be received by Gunzburg from the licensing and marketing thereof, it being agreed that a corporation should be formed to promote the process, in which corporation plaintiff and Gunzburg would own equal amounts of the voting stock [R. 8-12]. In many and various respects specified in considerable detail in the complaint, plaintiff kept and performed his promises under the agreement, devoting his services and energies to the promotion and exploitation of Gunzburg's process, in reliance upon the latter's promise to compensate him as alleged [R. 12-17, 34].

The process proved to be a commercial success, Gunzburg entering into licensing contracts with Arch Oboler, Warner Bros. Pictures, Inc., Columbia Pictures Corporation and others for the production of motion pictures by the use of the process, and into a distribution agreement with Polaroid Corporation to sell disposable viewers for use by the audience in viewing such motion pictures, by reason of which contracts Gunzburg and his co-defendants received and derived net profits in amounts unknown to

plaintiff but alleged upon information and belief to be between \$6,000,000.00 and \$8,000,000.00 [R. 17-25].

Gunzburg breached his contract with plaintiff by appropriating to himself and to his co-defendants, with knowledge of plaintiff's contractual rights, all of the stock of the various corporations formed to receive the profits and proceeds of the business; by repudiating his agreement with plaintiff and denying its existence; and by refusing to pay to him the compensation agreed upon [R. 25-34].

The complaint prayed for a declaration that plaintiff was a partner of Gunzburg in the subject enterprise and entitled to share equally in the profits and proceeds thereof; that defendants be required to account for such profits and proceeds, as to which plaintiff was entitled to 50% thereof, and that he have judgment therefor, with interest; and for damages in the sum of \$3,500,000.00, with interest [R. 34-39].

Demand for jury trial was duly endorsed upon the complaint [R. 40].

2. Defendants thereupon noticed a number of motions prior to Answer. Among the motions noticed were: (1) a motion to strike the demand for jury trial upon the ground that "plaintiff's claim is cognizable and remedial in equity" [R. 41]; and (2) motions for separate trial upon the issues as to whether the agreement between plaintiff and Gunzburg, alleged in the complaint, ever existed, and to limit the scope of pre-trial discovery to that issue, all upon the ground that a finding adverse to plaintiff upon that issue would make it "unnecessary to explore the further involved and highly complicated issues of breach, accounting and other matters" [R. 42]. These motions

were supported by the affidavit of defendants' counsel that in their answer, when same was filed, defendants would deny the existence of the agreement alleged in the complaint, and that the allegations relative thereto would be in issue in the action [R. 54-55]. In their Memorandum of Points and Authorities, filed in support of the motions, defendants premised their motion to strike the demand for jury trial upon the ground that the prayer for an accounting made the entire action equitable in nature [R. 45-49].

3. After a hearing upon the motions, the court made its order granting the motion for a separate trial, limited to the issues of the nature of the relationship between plaintiff and Gunzburg, and the existence and nature of the agreement, if any, between them; and limited the scope of discovery before trial to the issues as to which it had ordered the separate trial. It was further ordered that the issues as to which the separate trial had been ordered should be tried before the District Court without a jury, on the ground that, *upon the issues so ordered for such separate trial*, plaintiff "does not have a right to trial by jury" [R. 56-57].

4. Approximately one year later, at the time of the pre-trial hearing herein, plaintiff moved to file an amended complaint on the ground that the filing thereof was "necessary to clarify and simplify the issues herein" [R. 57-58]. The motion was granted and the amended complaint filed March 7, 1955 [R. 66].

5. As indicated, the amended complaint merely clarified and simplified the issues, adding no new issues and changing none, but simply eliminating extensive and detailed evidentiary and conclusionary allegations and correcting dates erroneously set forth in the original complaint.

It was thus alleged that between March 12, 1951 and April 9, 1951, plaintiff and Gunzburg had entered into an oral agreement to participate jointly in the development and commercial exploitation of the three-dimension process, and to share equally in the profits and proceeds therefrom [R. 60-61]. Performance by plaintiff was alleged [R. 61]. Defendants derived substantial amounts of money as profits and proceeds from the development and exploitation of the process, the exact amount whereof being known to defendants but unknown to plaintiff [R. 62-63]. On April 7, 1953, Gunzburg, acting on behalf of himself and his co-defendants, breached said oral agreement by denying its existence and refusing to account to plaintiff for his share of the profits thereof [R. 64].¹

Since the issues were not altered or modified in any material respect from those presented by the original complaint, as to which issues the District Court had ruled that plaintiff was not entitled to a jury trial, the demand for jury trial was not renewed. Thereafter, at the trial herein, the parties and the court proceeded, under the order for separate trial made upon the original complaint, to try *only* the issues of the existence and nature of the agreement between plaintiff and Gunzburg, the remaining issues as to certain defenses and as to an accounting for profits being reserved to a subsequent trial, if necessary. [R. 133, 154, 447, 1260-1261, 1517.]

6. The Answer of defendants denied substantially all of the allegations of the amended complaint relative to the making, existence, terms and breach of the agreement

¹The amended complaint also contained a common count for the reasonable value of services rendered, which is not in issue upon this appeal. [R. 64-65.]

alleged between plaintiff and Gunzburg. [R. 66-69.] Additionally, it alleged certain affirmative defenses and counterclaims, which were not reached by the court in the light of its findings upon the issues specified for the separate trial and are therefore not in issue on this appeal.

B. The Facts.

On this appeal, it is not contended that the evidence is insufficient to support the pertinent Findings of Fact or that such Findings of Fact are clearly erroneous. Accordingly, as we conceive the scope of this appeal, it would be neither necessary nor appropriate that we unduly extend the length of this Brief by detailing or summarizing all of the evidence, both in support of and opposed to the allegations of the complaint herein, as we would be required to do were the sufficiency of the evidence an issue upon this appeal.

By the same token, however, we are cognizant of the rule that the erroneous denial of a jury trial is prejudicial and reversible error only if plaintiff presented a factual case which would have been allowed to go to the jury—*i. e.*, that plaintiff must show, from the record, that the evidence would not have permitted the direction of a verdict against him. [*Leimer v. Woods* (8 Cir.), 196 F. 2d 828, 836-837.)

Accordingly, we find it necessary to detail, only in part, the most significant of a wealth of oral and documentary evidence supporting the allegations of the complaint. We do not pretend, however, that the evidence was all in favor of plaintiff below. On the contrary, we readily agree and, in fact, emphatically assert that the evidence below was in substantial conflict. In failing, therefore, to summarize in detail the evidence tending to support

defendants' denials of the agreement alleged in the complaint, we should not be understood as contending that such evidence does not exist, but only that, upon the issues presented by this appeal, that evidence is not material. With that explanation we turn, then, to a brief summary of plaintiff's case upon the evidence.

1. Plaintiff, a man of extensive, varied and productive experience in the motion picture industry [R. 134-136], first met defendant Milton Gunzburg in Los Angeles, California, on March 12, 1951. Gunzburg informed plaintiff that he had a three-dimension process for production and exhibition of motion pictures, which he would like to show to plaintiff. The latter agreed to view certain test footage photographed in the process by Gunzburg. He did so the following day. [R. 138-140.]

2. A day or two later, plaintiff met with Gunzburg in plaintiff's hotel room. Gunzburg stated that he needed the assistance of someone such as plaintiff in "selling" the process to the motion picture industry and exploiting it, but that he had no money to compensate plaintiff for the services which the latter would render. Plaintiff then offered to participate with Gunzburg on a "joint basis" in promoting the process, to which Gunzburg assented. [R. 143-146.]

3. On April 9, 1951, plaintiff and Gunzburg again met, this time in plaintiff's office in New York City. Gunzburg informed plaintiff that he had given approximately half his anticipated profits to others who had participated in the development of the process, having approximately one-half remaining, in which he proposed that he and plaintiff share equally. Plaintiff assented to this proposal. [R. 164-165.] The parties further agreed that plaintiff would handle the business affairs of

the proposed venture and the contacts with industry executives, while Gunzburg would devote himself primarily to the development of the process, each bearing his own expenses in connection therewith. [R. 165-168.]

4. Thereafter, in various manners and respects detailed at length in the extraordinarily voluminous correspondence thereafter ensuing between the parties, plaintiff proceeded with the performance of his obligations under the agreement hereinabove described. He contacted almost every executive of importance in the motion picture industry, striving to interest them in the process. He opened doors for Gunzburg to the offices of men who had declined to see him before his association with plaintiff. He lent his name and reputation to the strengthening of the infant enterprise. He constantly advised Gunzburg, upon the latter's express solicitation and repeated requests, upon every conceivable phase of their operation, including the terms and conditions of the licensing agreement for the production of the world's first three dimension feature-length motion picture. [R. 181-188; Exs. A-E, Z.]

5. Commencing with the release of a motion picture entitled "Bwana Devil," produced in the three-dimension process which plaintiff and Gunzburg had agreed jointly to exploit, in November, 1952, the public and industry interest in and demand for three-dimension motion pictures skyrocketed unbelievably. Contracts licensing the use of the process for unrevealed royalty payments were made by Gunzburg with Warner Bros. and numerous other motion picture producers. Gunzburg was licensed by Polaroid Corporation to sell three-dimension viewers for use by theater audiences in viewing such motion pictures. [R. 1081, 1288-1291, 1390-1393.] There is only

the most scanty and incomplete evidence as to the amount of royalties and profits derived from the foregoing and other contracts and marketing arrangements made with reference to the process, these subjects being foreclosed from inquiry by the court's limitation of the issues for both discovery and trial. It is a reasonable inference, however, that the profits and proceeds were enormous, Gunzburg's profit on the contract with Arch Oboler for the production of "Bwana Devil" *alone* amounting to \$270,000.00! [R. 676-677; Deft. Ex. 2 attached to Deposition of Seymour M. Peyser.]

6. By March, 1953, having received neither an accounting of receipts from Gunzburg nor his promised portion of the capital stock of the corporation formed to conduct the business of their enterprise, plaintiff made a number of inquiries and requests of Gunzburg therefor. Through his attorney, on April 7, 1953, Gunzburg denied the existence of any agreement to pay plaintiff anything, and repeated this denial and repudiation of the subject agreement personally to plaintiff on April 9, 1953, whereupon the present action ensued. [R. 196-200.]

7. Gunzburg's version of the conversations giving rise to the agreement sued upon was, of course, widely divergent from that of plaintiff. He admitted meeting plaintiff in Los Angeles on March 12, 1951, and showing him the test footage thereafter, but testified that it was done at plaintiff's solicitation. [R. 1315-1320.] He testified that he was then interested in the production of a motion picture of his own in three-dimension photography, entitled "Sweet Chariot." [R. 1325-1327.] Plaintiff allegedly explained to Gunzburg that, in his then-current occupation and business of functioning as sales representative for independent motion picture producers,

he would be interested in so functioning for Gunzburg in connection with "Sweet Chariot," should Gunzburg produce such a picture, for which service he would be compensated at 3% of the gross receipts. [R. 1327-1330.] There were no other or further conversations between Gunzburg and plaintiff in Los Angeles at this time. [R. 1332.]

According to Gunzburg, he and plaintiff again met on April 11 or 12, 1951, at the latter's office in New York, where again the parties discussed merely plaintiff's business as sales representative for independent producers. [R. 1296-1299.] They met again in plaintiff's office on April 18th or 19th. Plaintiff allegedly told Gunzburg that there was more to the latter's process than he had at first realized, that the problems which he would encounter and the scope of activities which he would have to conduct would be worth more than the customary 3% of the gross receipts on Gunzburg's picture. He pointed out that there were numerous possibilities for production by major motion picture producers licensing the process, and other means for turning the process to account, in relation to all of which plaintiff could render helpful and valuable services. He stated that he did not know what he could do for Gunzburg in respect to these matters, and offered to have Gunzburg judge the value of his services and set the amount of his compensation, based upon results achieved. [R. 1299-1304.] This was the only occasion upon which the subject of plaintiff's compensation for his services was ever discussed by the parties [R. 1305-1306.]

In Gunzburg's view, the foregoing conversations were the only ones in which any understanding was reached regarding plaintiff's services and compensation.

8. It will be seen that the crucial conversations between plaintiff and Gunzburg, out of which their relationship, whatever it was, arose, were had outside the presence of any other persons. As to the truth of their conflicting versions of these conversations, the court was required to make a determination based upon the relative credibility of the two interested party-witnesses.

In addition to plaintiff's testimony, however, a number of disinterested witnesses testified to admissions made by Gunzburg relative to his relationship with plaintiff, which admissions were consistent only with plaintiff's version of their agreement:

a. BRYAN FOY, a motion picture producer, produced a motion picture entitled "House of Wax" for Warner Bros., under a licensing contract between the latter and the Gunzburg venture for the use of the three-dimension process. [R. 616.] During production in February, 1953, in a conversation with Gunzburg, the latter informed Foy that plaintiff was Gunzburg's partner in connection with the three-dimension process. [R. 617.]

b. ARCH OBOLER, an independent motion picture producer, produced "Bwana Devil," the first feature-length motion picture ever produced in the three-dimension process, under a licensing contract with Gunzburg. He first became interested in the possibility thereof in December, 1951, and he first contacted Gunzburg at the latter's home on December 31, 1951. [R. 1077.] On that occasion, Gunzburg informed Oboler that he was not free to discuss a licensing contract with Oboler until he had first cleared the matter with plaintiff, his associate, who had been of great value in the promotion and exploitation of the process. Gunzburg stated that plaintiff was "a part owner of the business." [R. 1078-1080.] On other occasions,

Gunzburg told Oboler that he had given "a very large piece" of the business to plaintiff and that plaintiff had a "large share of stock" in Gunzburg's company. [R. 1083.]

c. JERRY KAY, Oboler's assistant, was present at the meeting with Gunzburg on December 31, 1951 and corroborated Oboler's testimony with reference to Gunzburg's admissions there. [R. 1137-1138.] On a later occasion, Gunzburg informed her that plaintiff was his partner and that he would have to consult with plaintiff before making any decision. [R. 1139-1140.] On another occasion, Mrs. Gunzburg, in Gunzburg's presence, told Miss Kay that Gunzburg had given a "large piece" of the company to plaintiff.

d. RAY RUSSELL HEINZE, employed by Gunzburg during much of the period involved here, testified that on a number of occasions Gunzburg referred to plaintiff as his "associate" and as his "partner." [R. 1050.]

e. ELSIE BALD, Gunzburg's secretary during much of that period, testified to hearing numerous telephone conversations between Gunzburg and other persons in which Gunzburg described plaintiff as his "partner" and as his "associate." [R. 832-833.]

9. Press releases prepared and supervised by Gunzburg and issued under his direction for general circulation and publication continually referred to plaintiff as "a principal participant in," as "New York head of," and as "associated with" Gunzburg in, the latter's company. [R. 1014-1016, 1040, 1073-1074; Exs. 58-60.] In correspondence between the parties and with third persons, Gunzburg constantly referred to plaintiff as "top echelon" of their business venture, as his "associate," as his "New York associate," and the like. [Exs. A-E.] The correspondence between the parties, contained in five folders

of in excess of 300 separate letters, reflects a constant interchange of views between them as to every conceivable phase of the business of marketing the three-dimension process. [Exs. A-E.]

The foregoing is neither intended nor designed as an exhaustive summary of all of the evidence herein, nor is it claimed that defendants were wholly without any evidence corroborating Gunzburg's testimony. Since we make no claim that, as a matter of law, the evidence is insufficient to support the judgment below, we have limited our summary of that evidence to a brief showing of the substantial evidence offered by plaintiff in support of the allegations of his complaint, which evidence, under a proper mode of trial conformably to plaintiff's jury demand, would have supported a verdict in his favor below.

C. The Findings and Judgment.

The court found, essentially in conformity with Gunzburg's testimony, that plaintiff and Gunzburg had entered into an oral agreement shortly after March 12, 1951, under and pursuant to which plaintiff would endeavor to aid Gunzburg in attempting to arouse interest in and to secure a market for the latter's three-dimension process; and that if plaintiff succeeded in any of these objectives, he would receive reasonable compensation for his efforts, the amount whereof was to be agreed upon between the parties; but that plaintiff would be entitled to no compensation unless, as a result of his efforts, Gunzburg actually entered into a transaction procured for him by plaintiff. [Find. No. VII; R. 103-104.] Although plaintiff expended time and effort in the performance of this agreement, he did not succeed in his efforts and thereby became entitled to no compensation. [Find. No. XI; R. 105-106.]

No agreement for the joint exploitation or joint ownership of the three-dimension process or for a sharing of the net profits therefrom was ever made between plaintiff and Gunzburg. [Find. Nos. VIII, IX, X; R. 104-105.] Defendants received profits and proceeds from licensing contracts and from the sale of three-dimensional viewers, but none of said defendants was under any contractual obligation to account to plaintiff therefor or to pay to him any monies by reason thereof. [Find. Nos. XII, XIII, XIV, XV; R. 106-108.]

Upon these findings, judgment was entered, dismissing the action on its merits. [R. 111.] The present appeal then ensued.

Specification of Errors.

1. The District Court erred in striking plaintiff's timely demand for trial by jury, upon defendant's motion therefor, where the complaint alleged the making of a contract to share profits and the breach thereof by defendants, and sought redress therefor under such contract, which issues of fact were properly triable by a jury; plaintiff's right to a jury trial not having been waived by the joinder of requests for some relief of an equitable nature. (Point A, *infra*.)

2. The District Court erred in striking, upon defendant's motion, plaintiff's timely demand for trial by jury as to issues concurrently specified for a separate trial by Court order which excluded from the issues to be separately tried all issues which were of equitable cognizance; leaving to be tried only the issues of the making, terms, performance and breach of an oral contract, which issues of fact were properly triable by a jury. (Point B, *infra*.)

Summary of Argument.

An action which alleges the making of an agreement to share profits, the performance thereof by plaintiff, and the repudiation and breach thereof by defendants, and which seeks the recovery of plaintiff's contractual share of the profits earned, states a claim upon which relief may be granted in an action at law, and the issues of fact therein presented are properly triable by a jury upon timely demand therefor. (Point A, *infra*.)

Such an action, wherein it is alleged that the contract sued upon created a partnership relation, but that said partnership had been repudiated or terminated by defendants, states a right of action cognizable at law. A partner or joint venturer, where the partnership has been dissolved or terminated, may maintain an action at law against his former partner to recover his aliquot share of assets and profits of the partnership. The fact that plaintiff also seeks relief of an equitable nature in the same complaint or in the same count of his complaint does not deprive him of his right to a seasonably demanded jury trial upon the legal issues. (Point A, 1, *infra*.)

Such an action is not transformed into one solely of equitable cognizance by the fact that defendant must render an account of all of his transactions, or that such an accounting is prayed for in the complaint, in order to ascertain the amount of the judgment to which plaintiff is entitled. That fact may justify the court in ordering that the accounting phases of the action be tried before a master or before the court without a jury, but it does

not alter the legal character of the issues relating to the existence of the duty to account or deprive plaintiff of the right to a jury trial upon those issues. (Point A, 2, *infra*.)

Any danger of confusion or complexity arising from the submission to the jury of a complicated accounting of numerous transactions can be and was here averted by the separation of the issues for trial; trying first the issue of the duty to account, and trying thereafter, in a separate trial, any remaining issues of accounting and assessment of proper division of profits and assets. Having so ordered the separation of the issues for trial and thus excluded from the trial below all issues which might possibly be equitable in character, it was error for the trial court to deny plaintiff a jury trial of the purely legal issues remaining. (Point B, *infra*.)

Where, as here, the evidence below was amply sufficient to support a finding or verdict by a jury in plaintiff's favor upon the issues actually tried below, the erroneous denial of a jury trial thereon was prejudicial to plaintiff and requires reversal of the judgment appealed from. (Point C, *infra*.)

ARGUMENT.

In an Action for Damages for Breach of Contract, Plaintiff Is Not Deprived of His Right to a Jury Trial of the Factual Issues Presented, Merely Because His Damages Can Only Be Precisely Computed Upon an Accounting of Defendants' Profits or Because He Also Seeks Some Equitable Relief. In Such an Action, the Failure to Permit a Jury Trial of Issues of Law Upon Timely Demand Is Reversible Error.

Inquiry into the propriety of the court's Order below, denying plaintiff's timely demand for a jury trial upon the issues actually tried, must necessarily commence with the recognition of certain fundamental principles applicable thereto. Thus, it is axiomatic that a party to an action under the Federal Rules is entitled, as of right upon timely demand therefor, to a jury trial of all issues in such action which would have been triable by a jury at common law.

Bruckman v. Hollzer (9 Cir.), 152 F. 2d 730, 732;

Oklahoma Contracting Co. v. Magnolia Pipe Line Co. (5 Cir.), 195 F. 2d 391, 396;

F. R. C. P., Rule 38(a).

The joinder in a single action or in a single count of a complaint of requests for legal and equitable relief arising from an operative set of facts does not deprive either party of a right to trial by jury, if seasonably demanded, with respect to those issues of fact which are legal in nature.

Bruckman v. Hollzer, supra, 152 F. 2d at 732-733;

Ring v. Spina (2 Cir.), 166 F. 2d 546, 550, *cert den.* 335 U. S. 813;

Leimer v. Woods (8 Cir.), 196 F. 2d 828, 833.

In a case involving both legal and equitable issues, a demand for jury trial which does not specify particular issues to be tried by the jury must be deemed to be a demand for trial of all issues so triable, and the court must submit all such issues to the jury.

F. R. C. P., Rule 38(b), (c);

Russell v. Laurel Music Corp. (S. D. N. Y.), 104 F. Supp. 815, 816.

The parties' entitlement to a jury trial cannot be determined by the characterization of an *action* as equitable or legal and granting or denying a jury trial upon that basis. It is the character of specific *issues*, and not the character of the *action*, which controls the determination; and if the action presents *issues* which are legal in character, a jury trial upon those issues must be accorded the party who timely demands it.

Reliance Life Ins. Co. v. Everglades Discount Co. (5 Cir.), 204 F. 2d 937, 942;

Dickinson v. General Accident etc. Co. (9 Cir.), 147 F. 2d 396, 397;

Bendix Avia. Corp. v. Glass (E. D. Pa.), 81 F. Supp. 645, 646;

Morrison-Knudsen Co. v. Wiggins (D. C. Alaska), 13 F. R. D. 304, 305.

“ . . . there are no longer equity cases and law cases, and it is the issues, not the form of the case, which now determine the method of trial.”

Bendix Avia. Corp. v. Glass, supra.

To the same effect is the statement of this Court in ruling upon the same question:

“The right to a jury in the domain or field of equity such as is here involved is determinable *by the issues of fact that are pleaded* in the concrete suit and the type and quality of the remedies that are applicable and available to the suitor.” (Emphasis added.)

Johnson v. Gardner (9 Cir.), 179 F. 2d 114, 117.

That, judged by these standards, plaintiff's complaint presented issues of fact that were unmistakably legal in character, entitling him to a jury trial of those issues, is demonstrably clear.

A. In an Action for Breach of Contract to Pay a Percentage of the Profits of a Business, the Issues Relating to the Existence and Breach of the Contract Are Legal in Character, and the Accounting Features Thereof, as an Adjunct to the Determination of Damages, Do Not Convert the Case Into an Action in Equity.

1. AN ACTION FOR BREACH OF CONTRACT TO SHARE PROFITS IS AN ACTION AT LAW AND NOT IN EQUITY, NOTWITHSTANDING THAT AN ACCOUNTING MAY BE REQUIRED IN ORDER TO ASCERTAIN THE AMOUNT OF PROFITS AND, CONSEQUENTLY, THE AMOUNT OF DAMAGES TO WHICH PLAINTIFF IS ENTITLED.

Plaintiff's complaint herein was, as we have observed, entitled “COMPLAINT FOR BREACH OF CONTRACT.” Conformably to its title, it pleaded an agreement between plaintiff and Gunzburg by which plaintiff agreed to render his services to Gunzburg in the promotion and exploitation of the latter's business, in return for Gunzburg's promise to pay plaintiff 50% of the profits therefrom; the performance of the agreement by plaintiff; and the breach and

repudiation by defendants, by refusing to pay to plaintiff his agreed compensation.² The complaint alleged that the business had earned profits in excess of \$6,000,000.00, the exact amount whereof was unknown to plaintiff, of which he was entitled to 50%. It prayed for an accounting of the profits earned and the payment to plaintiff of his rightful share thereof, for a declaration that plaintiff and Gunzburg were partners, and for a division of assets. (Statement of the Case, A, 1, *supra*.)

According to the affidavit of defendants' counsel, filed in support of the motion to strike the demand for jury trial, the disputed issues of fact to be presented below (and which were in fact the only issues tried below) included the factual issues of the making, terms and breach of the agreement alleged. (Statement of the Case, A, 2, *supra*.)

To be sure, the complaint alleged, as conclusions of law from the allegations respecting the agreement between the parties, that plaintiff and Gunzburg were partners, and sought a division of assets and declaration of rights as between partners, as *a part* of the total relief sought. That fact, however, did not make equitable in character the issues of fact presented by the complaint.

In the first place, although the remedies of partners in an existing and continuing copartnership are equitable only, where, as here, a partnership or joint venture

²The propriety of plaintiff's jury demand was, of course, determined upon the issues presented by the original complaint. The amended complaint simply shortened and clarified those allegations and eliminated a number of specific prayers for relief, but did not alter or enlarge the issues presented. There was, accordingly, no cause or justification for renewing a previously stricken jury demand. [*Canister Co. v. National Can Co.* (D. C. Del.), 101 F. Supp. 785, 789.]

has terminated, one partner or co-adventurer may sue the other *in an action at law* for recovery of his rightful share of the profits or losses, upon the other's breach of the partnership agreement.

Barlin v. Barlin, 145 A. C. A. 456, 459-460,
P. 2d (Oct. 24, 1956);

Elsbach v. Mulligan, 58 Cal. App. 2d 345, 369-
370, 136 P. 2d 651.

Here the complaint alleged the existence of such a partnership or joint venture and its termination by defendants' breach of the agreement with plaintiff creating the relationship. Upon these allegations, plaintiff sought to recover his share of the profits, a sum which was capable of being computed with certainty from the amount of the profits earned. Under the law of California—which must govern here, this being a diversity case (*Erie R.R. Co. v. Tompkins*, 304 U. S. 64, 79-80)—such an action is one at law, triable by a jury as a matter of right.

But even if it be assumed, for purpose only of argument, that the relief thus sought, premised upon the theory that a partnership was thus created, is cognizable only in equity, still that fact would not justify the denial of a jury trial, since such relief was only a part of the relief sought by plaintiff. And, of course, it is clear that the joinder of such equitable claims with other legal claims, if indeed the claims were equitable, does not defeat plaintiff's right to a jury trial upon the legal issues concurrently presented.

Bruckman v. Hollzer (9 Cir.), 152 F. 2d 730, 732-
733;

Ring v. Spina (2 Cir.), 166 F. 2d 546, 550, *cert.*
den. 335 U. S. 813.

Actually, and notwithstanding the conclusions set forth in the complaint, plaintiff's right to recover his share of the profits of the business, as alleged in his complaint, was in no wise dependent upon allegation or proof that the agreement alleged created the legal relationship of partnership or joint venture. The fact that, by agreement, one party renders services to another in exchange for a share of the latter's profits does not necessarily or for that reason make the parties partners or joint venturers. Conversely, the agreement to share profits is enforceable regardless of the fact that the parties may not be partners or joint venturers; and the promisee may maintain *an action at law* to recover his rightful share of the profits under the agreement.

Nelson v. Abraham, 29 Cal. 2d 745, 750-751, 177 P. 2d 931;

Spier v. Lang, 4 Cal. 2d 711, 716-717, 53 P. 2d 138;

Bishop v. Kelley, 100 Cal. App. 2d 775, 782-783, 224 P. 2d 814;

Champagne v. Passons, 95 Cal. App. 15, 29, 272 Pac. 353.

"The fact that the complaint is drawn on the theory that the parol agreement between the parties contemplated only a partnership does not prevent the granting of the relief on some other theory based on the facts in evidence. . . ."

"It is, however, unnecessary to place a precise legal designation on the relationship between the parties. . . . The oral agreement and the conduct of the parties . . . define their respective rights, liabilities and duties one to the other *without the necessity for designating their relationship by a particular label.*" (*Nelson v. Abraham*, 29 Cal. 2d 745, 749, 750, 177 P. 2d 931 (emphasis added).)

That the promisee under such an agreement may properly enforce his rights to a share of the profits *in an action at law*, notwithstanding that an accounting must be had to ascertain the sums due him, similarly does not rest in doubt. Thus, in *Bishop v. Kelley*, 100 Cal. App. 2d 775, 783, 224 P. 2d 814, the court, in dealing with precisely that question, stated:

“Thus, when such profits were earned by the completion of a job, an amount of money measured by these profits should have been ascertained and such sum would then have been payable to respondent as a money demand. *For this sum he had a cause of action in debt, and the findings as made place his action on that basis.* Hence he was properly entitled to an account. (*Nelson v. Abraham*, 29 Cal. 2d 745, 751, 752 [177 P. 2d 931].)” (Emphasis added.)

It follows that, having pleaded the essential elements of a contract to share profits, his performance thereof, and the breach by defendants, plaintiff was entitled to maintain an action at law for his damages sustained thereby, being entitled to a jury trial thereon; and in such action to have the amount of his damages ascertained by an accounting of defendants' profits.

Ex parte Peterson, 253 U. S. 300, 306-308;

McNair v. Burt (5 Cir.), 68 F. 2d 814, 815;

Mounger v. Wells (5 Cir.), 23 F. 2d 374, 375;

United States v. Sinclair Prairie Oil Co. (N. D. Okla.), 21 F. Supp. 179, 180-181;

Bercovici v. Chaplin (S. D. N. Y.), 3 F. R. D. 409, 410;

5 Moore's Federal Practice, Sec. 38.25, pp. 201-202.

2. A PRAYER FOR AN ACCOUNTING, EVEN AS THE MAJOR OR EXCLUSIVE ITEM OF RELIEF SOUGHT, DOES NOT MAKE THE ACTION EITHER EXCLUSIVELY EQUITABLE OR EXCLUSIVELY LEGAL, SINCE BOTH LAW AND EQUITY HAVE JURISDICTION OVER ACCOUNTING ACTIONS; AND THE RIGHT TO A JURY TRIAL MUST BE DETERMINED BY REFERENCE TO THE FACTUAL ISSUES FROM WHICH THE RIGHT TO AN ACCOUNTING IS ALLEGED TO ARISE.

Nor was the nature of the issues or of the action altered by the prayer or the necessity for an accounting of defendants' profits in order to determine the amount of such profits to which plaintiff was entitled under the agreement alleged.

It does not aid defendants to label this action, as they did in the District Court [R. 47-49], as an "accounting action," since "accounting actions" are neither exclusively legal nor exclusively equitable; but are rather within the concurrent jurisdiction of law and equity.

H. B. Zachry Co. v. Terry (5 Cir.), 195 F. 2d 185, 189;

McNair v. Burt (5 Cir.), 68 F. 2d 814, 815.

See also, in accord with the foregoing authorities:

McPherson v. Great Western Milling Co., 45 Cal. App. 91, 93-94, 187 Pac. 80;

Moore v. Coyne & Delaney Mfg. Co., 98 N. Y. Supp. 892, 894;

Ehrlich v. Jack Mills, Inc., 213 N. Y. Supp. 395, 398.

Actually, the origin of jurisdiction to compel an accounting was at common law, in the action at law of account render. The action was invoked wherever under

the facts a legal duty was alleged to exist in the defendant to pay money to plaintiff, but wherein the amount thereof could be ascertained only by an accounting of the transactions from which the duty allegedly arose. In such cases, jurisdiction was held to be at law, in the common-law courts, and the parties were entitled to a jury trial upon the issue of the existence of the duty to pay and to account.

Yakus v. United States, 321 U. S. 414, 447.

The procedure in such action required the determination, first, by the jury whether defendant had a duty to account; whereupon, if it found such a duty, an interlocutory judgment for an accounting was entered. Thereupon, the accounting phase proceeded before an auditor and, if money were then found due to plaintiff, a judgment in his favor therefor was entered.³ Subsequently, the right to an accounting at law was preserved through the legal action of debt or assumpsit, and the right to a jury trial thereon preserved.

Bishop v. Kelley, 100 Cal. App. 2d 775, 783, 224 P. 2d 814;

5 Moore's Federal Practice, Sec. 38.25, pp. 198-199.

Subsequently, courts of equity began to order an accounting in cases wherein the duty to account was itself a creature of equity—as in bankruptcy, creditor's bills, and the like—or in cases where, by reason of the complicated nature of the accounts, plaintiff's legal remedy was inadequate. In the first group of cases, equity jurisdiction

³Compare the Order for separate trials in the case at bar wherein precisely this procedure was prescribed and followed, but a jury trial denied.

was exclusive; while in the latter group, it was merely concurrent with jurisdiction at law.

5 Moore's Federal Practice, *supra*, p. 199;

McNair v. Burt (5 Cir.), 68 F. 2d 814, 815;

H. B. Zachry Co. v. Terry (5 Cir.), 195 F. 2d 185, 189.

It follows, then, that the labelling of an action as an "accounting action" does not, *ipso facto*, render it necessarily legal or necessarily equitable. It may be either or it may be both; and the nature of the action is determined, not by the prayer for an accounting, but by the nature and origin of the rights for the enforcement of which the accounting must be had. Where the rights sought to be asserted are legal in origin the action is one at law (or at most, one of concurrent jurisdiction), notwithstanding the prayer for an accounting; and the parties are entitled to a jury trial.

Mounger v. Wells (5 Cir.), 23 F. 2d 374, 375;

Universal Rim Co. v. General Motors Corp. (6 Cir.), 31 F. 2d 969, 970;

U.S.S.B.M.F. Corp. v. U. S. Fid. & Guar. Co.
C. A. D. C.), 77 F. 2d 370, 372;

McNair v. Burt (5 Cir.), 68 F. 2d 814, 815;

Bercovici v. Chaplin (S. D. N. Y.), 3 F. R. D. 409, 410;

United States v. Sinclair Prairie Oil Co. (N. D. Okla.), 21 Fed. Supp. 179, 180-181.

That the rights sought to be enforced in the case at bar had their origin at law and are normally enforceable in an action at law does not rest in doubt. Stripped to its essentials, plaintiff's complaint alleged the existence

of certain rights arising out of a contract, his performance thereof, and defendants' breach, entitling him to damages computed by reference to the terms of the contract. In its truest sense, plaintiff's action was, as the complaint was titled, "FOR BREACH OF CONTRACT." [R. 3.] The action differed from any other action at law for damages for breach of contract only in the irrelevant respect that defendants were required to account for their profits in order that the contractual measure of damages might be ascertained. The issues presented were *legal* in nature and the action, even with its accounting features, was by nature an action at law prior to the adoption of the Federal Rules. The necessary result is that, on the issues thus presented, plaintiff was entitled to a jury trial as a matter of right.

Squarely on point in this respect is the decision of District Judge Rifkind of the Southern District of New York, in Bercovici v. Chaplin (S. D. N. Y.), 3 F. R. D. 409. In denying a motion to strike plaintiff's demand for jury trial in an action on a contract by which defendant had agreed to pay plaintiff a percentage of his receipts from the exhibition of a motion picture, Judge Rifkind stated:

"The first count alleges that plaintiff and defendant entered into an agreement to collaborate in the production of a series of motion pictures and that, for plaintiff's contribution, defendant agreed to pay him 15% of the gross receipts of each motion picture and to give him screen credit as co-author; that plaintiff duly performed; that defendant repudiated the agreement; that he produced a screen play entitled 'The Great Dictator,' based upon plaintiff's satire, but denied him screen credit and has refused to pay him the stipulated share of the receipts. The claim

alleged is for damages for breach of contract. *Such a claim is cognizable at law and plaintiff is entitled to have the issues tried to a jury. That the damages are measurable by receipts does not convert the claim into an equitable one.* Nor does the calling of the agreement a collaboration have that effect. *Even actions between partners may, in proper circumstances, be entertained at law.* . . .

“The practical difficulties of trying the issue of receipts to a jury can be largely overcome by recourse to Rule 53, which has adopted the practice approved in *Ex Parte Peterson*, 253 U. S. 300. . . .” (3 F. R. D. at 410. Emphasis added.)

To the same effect are the following cases, holding that an action upon a contract, wherein an accounting is necessary to ascertain the amount which may be owed to plaintiff, is an action at law, as to which plaintiff is entitled to a jury trial; and that the accounting features of the case may be determined by reference to a master or auditor:

Mounger v. Wells, *supra*, 23 F. 2d at 375;

Universal Rim Co. v. General Motors Corp., *supra*, 31 F. 2d at 970;

United States v. Sinclair Prairie Oil Co., *supra*, 21 Fed. Supp. at 179-180;

See also:

United States v. Bitter Root Development Co., 200 U. S. 451, 478-479.

The decision of this Court in *Johnson v. Gardner* (9 Cir.), 179 F. 2d 114, is not to the contrary. That was an action by a trustee in bankruptcy to avoid certain fraudulent conveyances by the bankrupt, and to compel

an accounting by the transferee, as trustee *ex maleficio*, of the rents derived from the property. Wholly apart from the question of accounting, the rights asserted by the trustee were cognizable, and the wrongs alleged were remediable, only in equity, and this Court specifically so held. (179 F. 2d at 117.) This, then, was not a case in which a prayer for an accounting made the action equitable in nature, but was rather one in which *the entire cause*, with reference to the origin of the rights asserted and the remedy of the wrongs alleged, was solely in equity, regardless of the prayer for an accounting, which was itself merely an incident of the vindication of an equitable right. That is a far cry from the case at bar, where the rights asserted are *legal* in character and the accounting is sought solely as an aid to their enforcement.

B. Whatever Equitable Flavor the Prayer for an Accounting May Have Imparted to the Action Below, That Feature Was Removed by the Order for Separate Trial Which Left, Upon the Phase of the Cause Actually Tried Below, Only Legal Issues.

But even if it be assumed that plaintiff's prayer for an accounting *did* inject an equitable issue into the cause (notwithstanding the plethora of cited authority to the contrary), that issue was removed from the issues actually tried, and with it was removed any remote justification for the denial of a jury trial, by the Order of the court below for a separate trial. By its Order, as we have seen, the court below limited the issues to be tried, and the trial was actually so limited, to the issues of existence, terms, performance and breach of the agreement alleged in the complaint. It specifically postponed for a later and separate trial all issues relating to the accounting between the parties or damages, *and underscored the*

separation thus achieved by similarly excluding these latter issues from the pre-trial discovery procedure! [R. 56-57.]

That Order effectively blocked out of the issues to be tried all issues of equitable cognizance. It left for trial only those issues which are historically legal in nature, indistinguishable from the same issues presented in every action at law for breach of contract! If the prayer for an accounting presented equitable issues in the present case, *those issues were not included in the issues actually tried or ordered for trial.* It is absurd to contend that “equitable issues” presented by a complaint nullify a demand for a jury trial when those very issues have been, by court order, sifted out from the matters to be tried.

In point of fact, it is a recognized and accepted rule of procedure to utilize the device of separate trials under Rule 42(b) of the Federal Rules of Civil Procedure to separate legal issues from equitable issues, for the very purpose of permitting a jury trial upon the former, and a trial by the court upon the latter. Where this has been done, it is well settled that the parties are entitled to a jury trial of the legal issues, regardless of what might otherwise have been the result had the issues not been so separated.

United States v. Yellow Cab Co., 340 U. S. 543, 555-556;

Keene v. Hale Halsell Co. (5 Cir.), 118 F. 2d 332, 335 (in an action to establish a debt and pursue property into the hands of a fraudulent transferee of the debtor, held that the parties were entitled to a separate trial by jury as to the existence of the debt, followed by a court trial of the allegedly fraudulent conveyance);

Bowie v. Sorrell (4 Cir.), 209 F. 2d 49, 51;

Smith, Kline & French v. International Pharmaceutical Labs. (E. D. N. Y.), 98 F. Supp. 899, 901;

5 Moore's Federal Practice, Sec. 42.03, pp. 1211-1214.

It is fundamental that whether a party is entitled to a trial by jury upon seasonable demand is dependent upon the nature of the issues actually to be tried. Where, as here, all issues relating to prayers for what might be equitable relief have been postponed for a later trial under Rule 42(b), the issues remaining being only factual and legal, it follows that it is error to deny a jury trial upon those issues.

The Order for separate trials similarly provides its own answer to any suggestion that the possibly complicated and detailed nature of the required accounting herein justifies the submission thereof to the court sitting without a jury. (*Cf. H. B. Zachry Co. v. Terry* (5 Cir.), 195 F. 2d 185, 189.) To the extent that such complicated and detailed nature would make *the accounting phase of the case* one for trial by the court, that could have been here accomplished without depriving plaintiff of a jury trial upon the issues of defendants' legal *duty to account*.

In the case at bar, the trial below was expressly limited to issues which were, in effect, issues relating to liability, from which the accounting question was expressly excluded. The trial which was ordered below and which was actually had was not in any respect concerned with the accounting feature of the case. If the required accounting was prospectively too complicated to submit to a jury, that fact could not and should not have permitted a denial of a jury as to a trial from which this pre-

sumptively complicated accounting was expressly excluded by the Order for separate trial!

There is ample authority for the proposition that a seasonably demanded jury trial must be accorded the parties upon the question of defendant's duty to account, after which the actual accounting may be had before a master or before the court without a jury.

Bercovici v. Chaplin, *supra*, 3 F. R. D. at 410;

Mounger v. Wells, *supra*, 23 F. 2d at 375;

United States v. Sinclair Prairie Oil Co., *supra*,
21 Fed. Supp. at 180-181;

Bruckman v. Hollzer (9 Cir.), 152 F. 2d 730, 733.

Having in fact so separated the issues in the case at bar, the trial court necessarily erred in denying a jury trial as to issues from which all questions of equitable cognizance had been separated. Upon the issues actually tried, plaintiff was entitled to and was erroneously denied a jury trial.

C. The Erroneous Denial of a Jury Trial Is Always Prejudicial in Any Case in Which the Evidence Adduced by the Party Erroneously Denied a Jury Trial Was Sufficient to Support a Jury Verdict in His Favor Upon the Matters at Issue. Here the Evidence Was Clearly so Sufficient.

It remains, then, only to determine whether the error in striking plaintiff's demand for jury trial was prejudicial and reversible. Clearly, it was. As we have observed from our purposely brief summary of the issues and evidence at the trial herein (Statement of the Case, B, *supra*), the crucial issues upon which this case turned were essentially factual, requiring a resolution of the rela-

tive credibility of plaintiff and defendant Gunzburg, the only persons present at the conversations at which the contractual obligation sued upon was created. There can be little doubt that plaintiff's testimony, if believed, was amply sufficient to establish a contract to pay to him 50% of Gunzburg's profits from the three-dimension business enterprise. Additionally, plaintiff's testimony was strongly buttressed by testimony given by a substantial number of wholly independent witnesses, of admissions by Gunzburg of a most positive character that plaintiff was Gunzburg's "partner" and the owner of "a part of the business" and of "a large share of the stock" of the company. (Statement of the Case, B, 8, *supra*.)

The testimony of plaintiff, supported by the testimony of these independent witnesses, was further reinforced by a plethora of documentary evidence which Gunzburg could not deny, since those documents were actually written by him or the writing thereof supervised by him and the documents published pursuant to his directions. These documents, consisting of press releases, letters to plaintiff and other persons in the industry, and proposals and presentations to others, contained a wide variety of statements by Gunzburg concerning plaintiff's role and participation in the business enterprise and discussions between the parties of an enormous number of different subjects relating to all phases of their joint enterprise. (Statement of the Case, B, 9, *supra*.) These statements and discussions furnished a clear, if not compelling, basis for the inference that the relationship of the parties was that of the close, jointly participating nature described by plaintiff, and not that of the loose, uncertain and indefinitely contingent variety described by Gunzburg. And, finally, plaintiff's wide-ranging activities in connection

with all phases of the business, including his close consultation with Gunzburg upon the most important operations of the enterprise, spoke eloquently of the relationship which plaintiff claimed that the parties had formulated. (Statement of the Case, B, 4, *supra*.)

That the aggregate of all of this oral and documentary evidence, viewed for its weight and sufficiency, would have furnished ample and abundant support for a verdict that plaintiff was entitled by contract to 50% of Gunzburg's profits, cannot seriously be questioned. Of course, all of that testimony might have been disbelieved and discounted as, apparently, it was disbelieved and discounted by the trial court, but that is not the point here. That the evidence adduced by defendants (which we have not summarized here for the reason that it is beside the point on this issue) furnished support for Gunzburg's version of the oral agreement we readily concede for the purpose of this argument; but that, too, is not the point here. If believed, *and plaintiff was entitled to have its credibility assessed in the mode of trial chosen by him and guaranteed to him by the Constitution*, the evidence produced by plaintiff would have amply supported a jury verdict in his favor.

It necessarily follows, therefore, that since plaintiff was entitled to a jury trial here as a matter of right (Points A, B, *supra*), the denial of such a trial notwithstanding his timely demand therefor was prejudicial error, necessitating the reversal of the judgment below.

Dickinson v. General Accident etc. Corp. (9 Cir.),
147 F. 2d 396, 397;

Leimer v. Woods (8 Cir.), 196 F. 2d 828, 833-834,
836-837;

Bowie v. Sorrell (4 Cir.), 209 F. 2d 49, 51;

Mounger v. Wells (5 Cir.), 23 F. 2d 374.

Thus, in *Bowie v. Sorrell*, *supra*, where the plaintiff had been erroneously denied a jury trial on the issue of the validity of a release, the Court of Appeals for the Fourth Circuit, in reversing the judgment and remanding the cause for a new trial, stated:

“We are not impressed by the statement in the brief for defendants: ‘We do not see how Bowie was prejudiced in any way by a failure to submit the issue of the validity of the release to a jury.’ The right to a jury trial in a federal court, in a proper case, is guaranteed by the 7th Amendment to the United States Constitution and has been sedulously guarded by a long line of judicial decisions . . . The case must, therefore, be remanded to the District Court with instructions to grant a jury trial on the question of the validity of the release.”

See also:

Jacob v. City of New York, 315 U. S. 752.

It being clear, then, that the denial of plaintiff's demand for jury trial was error, that error was prejudicial and requires reversal of the judgment below.

Conclusion.

In *Bruckman v. Hollzer* (9 Cir.), 152 F. 2d 730, 732-733, this Court declared its recognition of the purpose of the Federal Rules of Civil Procedure to protect and preserve the rights of the parties before the court to a jury trial of the issues of fact properly triable by a jury, while at the same time encouraging the joinder in a single action of all claims to relief, both legal and equitable; thus averting the piecemeal adjudication of their rights and duties

in separate legal and equitable actions. In that connection, the Court stated:

“The rules introduce the radical change in the federal practice of creating the jurisdiction in the District Courts to hear and determine in a single suit equity claims, with a claim which theretofore could have a common law adjudication in a separate suit. We take it that it is to ‘preserve’ in the suit provided by the rules the common law adjudication by jury trial existing in a separate suit when such a claim is joined with equitable claims having a common issue of fact, that Rule 38(a) provides: ‘(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.’

“ . . . We regard the rules enlarging the powers of the single tribunal to hear and determine equitable and legal transactions in which the pre-existing right to jury trial is to be preserved, as a long forward step in our judicial procedure. We consider one of its major purposes is to remove the expensive and time-losing requirement of two separate units to give to the litigant his jury as well as his equitable relief. We are not in accord with the extreme judicial conservatism which instinctively clings to outmoded intricate processes and would seek to nullify or minimize every attempt for their simplification.”

Whatever prejudice, confusion or difficulty might be engendered by the joint resolution of legal issues by a jury and equitable issues by the Court, this Court stated, could be alleviated under Rule 42(b) by ordering separate trials, first of the legal issues and thereafter of the equi-

table issues. (*Bruckman v. Hollzer* (9 Cir.), 152 F. 2d 730, 733.)

That is precisely what the trial court did here. It ordered separate trials, first, of the legal issues of the making, terms, performance and breach of the contract alleged; and second, of the accounting for profits, and dissolution and division of assets. Having so separated the issues, it was consonant neither with the spirit and purpose of the Federal Rules, as defined and declared by this Court, nor with the Constitutional guaranty of trial by jury for the Court below to deny to plaintiff a jury trial upon the exclusively legal issues it had thus ordered to be separately tried.

Since the evidence below would clearly have sustained a verdict in plaintiff's favor upon the issues tried, the erroneous action of the trial court was necessarily prejudicial and requires reversal of the judgment from which this appeal has been taken.

Respectfully submitted,

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No. 15208

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE J. SCHAEFER,

Appellant,

vs.

MILTON L. GUNZBURG, *et al.*,

Appellees.

APPELLEES' BRIEF.

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No. 15208

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE J. SCHAEFER,

Appellant,

vs.

MILTON L. GUNZBURG, *et al.*,

Appellees.

APPELLEES' BRIEF.

Preliminary Statement.

In his action below, plaintiff-appellant alleged the making of a specific oral partnership agreement with defendant, Milton L. Gunzburg; asserted that "Plaintiff does not have any adequate remedy at law"; and demanded an accounting, an injunction, a receivership and various other equitable remedies; and asked for a jury trial. Defendant-appellees' answer completely controverted the complaint.

On appellees' motion the action was tried to the court, resulting in judgment for defendant-appellees.

On this appeal, plaintiff-appellant's sole contention is that he was entitled to a jury trial. His contention is based entirely on the assertion that his complaint alleged a legal claim rather than an equitable one.

The Position of Defendants-Appellees.

The primary position of defendants-appellees is that the claim pleaded by plaintiff-appellant was cognizable solely in equity, and that the trial court was correct in striking his demand for a jury trial.

But it is also believed that the evidence supporting the conclusion of the trial court on the merits is so overwhelming that, even had a jury trial been appropriate, any error in its denial was not prejudicial.

This second position makes it necessary to state the facts in some detail.

Statement of Jurisdiction.

1. The jurisdiction of the Court of Appeals to review the judgment of the District Court is believed to be conferred by Title 28, United States Code, Section 1291.

2. The jurisdiction of the District Court herein is believed to be sustained by Title 28, United States Code, Section 1332(1).

3. The existence of jurisdiction in the District Court is shown by the allegations of the complaint that plaintiff is a citizen and resident of the State of New York, that the individual and corporate defendants are each and all citizens and residents of the State of California [R. pp. 3-4]; and that the amount in controversy exceeds the sum of \$3,000, exclusive of interest and costs [R. p. 4]. The Findings of Fact are in accord with the jurisdictional allegations of the complaint [R. pp. 101-102].

4. The final judgment from which this appeal is taken was entered on March 28, 1956 [R. pp. 110-111]. Plaintiff served and filed his notice of appeal on April 26, 1956 [R. pp. 111-112].

Statement of the Case.

George Schaefer (plaintiff-appellant, hereinafter called Schaefer or "appellant") was a producers' representative in the motion picture industry.

Early in 1951 he met Milton L. Gunzburg (the principal defendant and appellee) who had perfected a system of three dimension motion picture projection. Appellant represented that he could perform services for Gunzburg in securing the financing for, or production of, a motion picture in Gunzburg's system, called Natural Vision. Appellant agreed that any compensation for his services would be contingent upon his securing results.

Thereafter, appellant made some efforts, but utterly failed to achieve any of the results he had promised.

On the other hand, Gunzburg and his wife, Vera, by devoting to their project all of their time, effort and money over a period of three (3) years succeeded on their own in marketing their Natural Vision system.

In 1953, after Gunzburg's success was assured, appellant told Gunzburg (for the first time) that he felt he was entitled to 25% of Natural Vision for his effort and advice. When this request was rejected, he threatened that he would secure 50% of Gunzburg's enterprise. Six (6) months thereafter, he filed a complaint in which: he sought to establish an oral partnership with Gunzburg; claimed he was entitled to an equal share of the partnership profits; declared he had no adequate remedy at law; and demanded an accounting, an injunction, a receivership and various other equitable remedies, and demanded a jury trial [Complaint, Pars. Sixteenth, Thirty, Forty-Fourth and the Prayer; R. pp. 8-40]. The appellees' Answer denied the making of any partnership agreement

or the performance of the alleged partnership functions by appellant, and alleged various affirmative defenses.

After a hearing, the trial court granted appellees' timely motion to strike the demand for a jury trial on the ground that the complaint was cognizable and remedial in equity.

Thereafter, the case was tried to the Court. It involved over 2,000 pages of deposition (which required over a month to take); 25 witnesses; over 100 exhibits; and 21 trial days. Comprehensive trial briefs were filed with the trial court.

At the conclusion of the trial the Court rendered judgment for appellees, stating:

"I have placed little credence upon the testimony of the plaintiff. It is my view that he attempted through this action to obtain something to which he was not entitled." [R. p. 100.]

After this extended record and trial, appellant is now here before this court making only a single claim of error.

Analysis discloses his appeal is singularly lacking in those qualities which commend the sympathetic review of an appellate tribunal.

Appellant does not claim that the findings below were made contrary to the evidence. Indeed, he concedes that he makes no such claim (Appellant's Br. p. 9).

Appellant does not claim that the judgment below has worked an injustice.

Appellant does not claim that unique or novel propositions of law are involved here.

Appellant asserts only that he should have been granted a trial to a jury instead of to a court.

It is respectfully submitted, as will be demonstrated hereafter, that appellant's claim of a right to trial by jury is completely unfounded and is based upon what can only be described as a misrepresentation of his complaint. As opposed to appellant's *assertions* as to the nature of his complaint, an actual reading of the complaint itself instantly discloses it is equitable in form, in substance, and in the relief sought. This being so, the court below properly denied a jury trial in an equitable proceeding.

Facts.

Because of the highly colored and sketchy manner in which appellant has purported to state the facts we find it necessary to set them forth in greater detail than we should ordinarily like to do in an appellees' brief.

Milton L. Gunzburg, appellee and defendant (hereinafter called "Gunsburg"), an experienced motion picture writer, determined in 1949 to engage in motion picture production on his own account [R. pp. 1200-1201].

By June of 1950 he had invested almost all his own funds and borrowed substantial sums of money from his mother-in-law, Rose Berch, his father, Samuel Gunzburg, and his brother, Dr. Julian Gunzburg, pursuant to an agreement that if his venture succeeded, they would share in the profits [R. pp. 1204-1205]. These persons are all co-defendant-appellees in this case.

As a means of lending realism to their picture Gunzburg and his wife, Vera, who had worked with him full time on the project since its inception, turned to three dimensional photography [R. p. 1207]. They were guided in their research by Dr. Julian Gunzburg, a noted ophthalmologist and student of stereoscopic photography [R. pp. 1207, 1217-1218].

After intensive investigation, the Gunzburgs decided that they could produce a commercially feasible system. They bought the drawings and patents of an expert camera builder who had done some work in 16 mm. three dimension photography and under the guidance of Dr. Julian Gunzburg, began construction of equipment for a professional 35 mm. camera [R. pp. 1214, 1216]. Tests of the equipment were successful [R. p. 1217]. Thereupon, Gunzburg began to exhibit his system (called Natural Vision) to the motion picture industry [R. pp. 1226-1229, 1248-1251]. He also began negotiations for an exclusive franchise from the Polaroid Company, which produced the polarized material used in viewers, without which spectators at a three dimension motion picture could not achieve the illusion of depth [R. pp. 1217, 1223-1225].

In March of 1951, Gunzburg met appellant, who was known in the motion picture industry as a producers' representative, that is, a person who, for a percentage of the receipts of an independently produced motion picture, will exercise the producer's right to approve exhibition contracts [R. pp. 1327-1328]. Appellant told Gunzburg he believed he could be of assistance to him in securing distribution and financing for his proposed motion picture [R. pp. 1328-1329]. Shortly thereafter, appellant returned to his home in New York.

In April of 1951, Gunzburg journeyed from his home in Los Angeles to Cambridge, Massachusetts, where he successfully negotiated an exclusive contract to distribute viewers for the Polaroid Corporation [R. pp. 1286-1291].

From Cambridge, he traveled to New York to show his experimental 3-D film to various motion picture personages and representatives of the Army, Navy and Air Force [R. pp. 1292-1293; 1310-1312].

In New York, appellant and Gunzburg had a discussion in which appellant declared that he was not sure that 3%, the customary producers' representative fee, would be sufficient compensation because of the unusual problems presented by a three dimension motion picture and stated he might want 5% [R. pp. 1302-1303]. Appellant also said that if he were able to bring Gunzburg a deal warranting it, he would like to be cut in on the process. Appellant concluded that if he did not bring Gunzburg financing, he would not want anything because he had not done anything [R. pp. 1360-1361; 1487-1488].

Thereafter, despite some effort on his part, appellant was completely unable to secure financing or to induce anyone else to make a picture using Gunzburg's process [R. pp. 103-104; Findings, Par. VII, R. p. 358].

In December of 1951, Gunzburg met Arch Oboler, an independent producer [R. p. 1362]. At that time, Oboler had not met appellant who had nothing whatsoever to do with Oboler's introduction to Gunzburg [R. p. 303].

Oboler was impressed by Gunzburg's system and entered into a written contract with Gunzburg, securing the right to use the Natural Vision process on one picture in return for a 20% profit participation to Gunzburg [Pltf. Ex. No. 42].

At Gunzburg's suggestion, Oboler hired appellant to act as producers' representative on the proposed 3-D picture which was to be called BWANA DEVIL [R. pp. 1362-1363]. The contract called for a 3% fee to appellant [Appellees' Ex. G].

In his representation of Oboler's company (called Gulu Picture Company), appellant vigorously championed Oboler in various disputes that arose between Oboler and Gunzburg as to their respective rights under the licensing agreement [R. pp. 1612-1613].

In November of 1952, BWANA DEVIL was premiered in Los Angeles and achieved popular success. In December of 1952, Oboler was approached by Edward Alperson, a motion picture exhibitor, who wished to purchase BWANA DEVIL. Appellant represented Oboler in the sale under his employment agreement which gave him a 5% commission on any sales effected. These negotiations directly affected Gunzburg's interests [R. pp. 319-339].

Appellant's unconscionable conduct in the negotiations resulting in a sale, as well as in other matters which directly affected Gunzburg, has raised the issue of appellant's "unclean hands." To avoid duplication, the facts (which come entirely from appellant's own testimony) will not be stated here but will be set forth in the argument which deals with his unclean hands.

During the years 1951 and 1952, appellant devoted the great bulk of his time to his various business enterprises and did not even claim that he had spent more than 5% of

his time in an effort to secure financing or production for Gunzburg [R. pp. 499-500]. From November, 1952, on, such of appellant's time as was not devoted to his other interests was spent in performing his duties to Gulu Picture Company.

At no time did appellant ever: contribute any capital to Gunzburg's Natural Vision enterprise; have any direction in its management; negotiate or sign any contracts on its behalf; hire or fire help; share in the profits; or in any way enjoy or engage in any of the attributes of a partnership [R. pp. 411-415]. And at no time did appellant in any communication between himself and Gunzburg make any reference to a partnership between himself and Gunzburg, or in any way refer to the terms of any alleged agreement between them [R. pp. 292-293].

Appellant made no memo or note of his alleged partnership agreement with Gunzburg, although the mere recitation of its alleged terms took over four printed pages [R. pp. 8-12, 292-296].

Although he alleged his agreement was made in April of 1951, appellant never made any claim upon Gunzburg until March of 1953 [R. pp. 403-409]. At their last meeting appellant was censured by Gunzburg for making a demand, not only because it was completely unfounded, but also because, as an aggravation of the matter, Gunzburg had just begun to receive notice of various activities by appellant highly inimical to Gunzburg's business [R. pp. 1404-1406; 1613-1615].

Appellant left the meeting and never thereafter communicated with Gunzburg. Six months after the meeting, on October 27, 1953, appellant filed the complaint which gave rise to this case [R. p. 40].

Summary of Argument.

The appellant's complaint stated a claim by an alleged partner for a decree establishing his rights as a partner, asked for a dissolution of the partnership, an accounting of partnership profits and losses, the division of partnership properties and profits and asked for various forms of equitable relief *pendente lite*. This is undisputably an equitable action, and, hence, appellant had no right to a trial by a jury. Appellant's efforts to make it appear that he had stated a legal cause of action, as distinguished from an equitable cause, are based on a misrepresentation by him of the actual language and substance of his complaint. The fallacy of his position is immediately disclosed by a reading of the complaint itself.

Assuming, but only for the purposes of argument, that appellant had been entitled to a jury trial, he suffered no prejudicial error by reason of the judgment below, because the evidence against him was so overwhelming reasonable men could not differ from the conclusion that there was no partnership agreement, as alleged by appellant in his complaint.

And, finally upon the basis of evidence, coming entirely from his testimony and writings and the testimony of his own witnesses, it is indisputable that appellant was guilty of unclean hands; and so is barred from the court here and below, "*in limine*."

ARGUMENT.

I.

The Original Complaint States a Claim by an Alleged Partner: for a Decree Establishing His Rights as a Partner, for a Dissolution of the Partnership, Payment of Partnership Debts, an Accounting of Partnership Profits and Losses, the Following of Assets of the Partnership Into the Hands of Allegedly Guilty Third Persons, Division of Partnership Properties and Profits Between the Parties, an Award of Incidental Damages to the Extent Equitable Relief Might Prove Inadequate, and Finally, Equitable Relief Pendente Lite.

This Is a Classic Equitable Action. There Is No Right to Jury Trial of an Equitable Action Under the Seventh Amendment to the Constitution of the United States.

A. The Only Issue Before This Court Is the Propriety of the Trial Court's Order at the Time It Was Made. This Issue Is Determinable Solely by Reference to the Complaint; for, It Was This Pleading Which Was the Basis of the Trial Court's Order.

On March 5, 1954, upon timely motion, the trial court made the following order:

"3. The Motion to Strike the Demand for Jury Trial is granted to the extent that the Court will try first at a separate trial of the issue, as herein ordered, whether Plaintiff and Defendant Milton L. Gunzburg were partners, and the nature and character of their partnership agreement, if any; it appearing to the Court that on the aforesaid issue Plaintiff does not have a right to trial by jury:

"4. The Motion for an Order of the Court for a Separate Trial is granted and the Court hereby

orders that the issue of the existence of a partnership relation between Plaintiff and Defendant Milton L. Gunzburg, and the nature and character of their partnership agreement, if any, be tried by the Court first and separately from the other issues in the case. Whether a jury trial of other issues is to be determined after the issues are tried as directed in this paragraph;" [R. pp. 56-57].

Approximately a year later, on March 7, 1955, the Court permitted appellant to file an amended complaint. *No demand for a jury trial was made in relation to the amended complaint.* Thereafter, all parties went to trial *without objection at any time* to trial by the Court of *all* of the issues embraced in the Findings of Fact, Conclusions of Law and Judgment [R. p. 108; and Appellant's Br. p. 8, footnote 1].

Appellant's sole attack against the judgment below is upon the propriety, at the time it was made, of paragraph 3 of the Court's said order for trial by Court of the issue therein stated. *Appellant and appellees are agreed* that the propriety of the trial court's order must be determined by the contents of the complaint,¹ and conversely not upon the amended complaint. (Throughout this brief, when referring to the complaint, we mean the pleading upon which the Court's order was based, and not the amended complaint.)

Judicial authority is in complete accord that whether or not a plaintiff is entitled to a jury trial on issues or claims

¹Appellant's Opening Brief, p. 23, footnote 2.

alleged in his complaint is entirely determined from the face of the complaint.

Canister Co. v. Leahy (3 Cir.), 182 F. 2d 510, 513, cert. den. 342 U. S. 893, 72 S. Ct. 201, 96 L. Ed. 669;

Ring v. Spina, et al. (2 Cir.), 166 F. 2d 546, 549;

Fraser v. Geist (D. C., Pa.), 1 F. R. D. 267, 269;

Rosanna Knitted Sportswear v. Lass O'Scotland (D. C., N. Y.), 13 F. R. D. 325.

B. Appellant's Representation in His Brief of the Nature of His Complaint Is Neither Correct, Accurate nor Fair, as a Comparison of His Representation With the Allegations and Prayer of the Complaint Demonstrates.

The Seventh Amendment to the United States Constitution preserved the right to jury trial only as it existed at common law in England prior to and at the time of the adoption of the Constitution.

Dimick v. Schiedt, 293 U. S. 474, 79 L. Ed. 603, 55 S. Ct. 296;

Cyc. Fed. Proc., Sec. 31.17, p. 205.

The Rules of Civil Procedure merely implement this right, and do not enlarge or restrict it.

5 Moore's Federal Practice, Sec. 38.07, pp. 39-41, and Sec. 38.11(6), p. 115.

There is no right to jury trial of claims historically cognizable or remedial in equity.

Johnson v. Gardner (9 Cir.), 179 F. 2d 114, cert. den., 339 U. S. 935, 94 L. Ed. 1353, 70 S. Ct. 661.

So undoubted is the law set forth above, and so clearly is appellant's complaint equitable in form, substance, and relief sought that his contention he was entitled to a jury trial may very well be deemed frivolous. The basic lack of merit of his appeal can be concealed only by ignoring the actual complaint filed with the trial court and projecting a distorted picture of it.

This is what appellant has done in his brief.

Appellant summarizes his thirty-two page complaint in one paragraph. He then argues that this summary presents a legal claim upon which he had the right to jury trial.

The fundamental flaw is that this summary is neither a correct, accurate or fair representation of the complaint.

To demonstrate this it is only necessary to compare appellant's representations with his actual allegations. Appellant asserts in his brief:

“The action below was brought for damages for breach of a contract to share profits. By the terms of that contract, plaintiff's complaint alleged, defendant Milton L. Gunzburg agreed to pay to plaintiff, in return for plaintiff's agreement to render certain specified services, *a sum equal to 50% of the profits derived by the various defendants from a family business venture . . .* the complaint prayed, among other things, for an accounting of such profits and *a money judgment in favor of plaintiff for 50% thereof. . . .*” (Appellant's Op. Br. pp. 1 and 2) (emphasis added).

Appellant is not consistent in his own statement, for he also says in his brief that the complaint alleged:

“. . . an agreement between plaintiff and Gunzburg by which plaintiff agreed to render his services to

Gunzburg in the promotion and exploitation of *the latter's business*, in return for *Gunzburg's promise to pay plaintiff 50% of the profits therefrom. . . .*" (Appellant's Op. Br. p. 22) (emphasis added).

The errors and misrepresentations in these statements are:

1. Contrary to appellant's representation, *the complaint does not allege an employment contract but a partnership*. The complaint alleges that plaintiff and defendant Gunzburg *formed and jointly owned and operated* over a considerable period of time, namely from April 20, 1951, through at least March 30, 1953, a *partnership business*. Several excerpts demonstrate this point.

Paragraph Sixteenth of appellant's complaint states, in part, as follows:

"In such contract it was agreed that plaintiff Schaefer and defendant Milton L. Gunzburg should form and enter into, and by the terms thereof, plaintiff Schaefer and defendant Milton L. Gunzburg then and there did form and enter into, a partnership for the purpose of commercially exploiting and licensing the manufacture and use of such 3-D camera process. . . ." [R. pp. 8 and 9].

Paragraph Seventeenth states, in part, as follows:

"In such contract, it was agreed that defendant Milton L. Gunzburg should hold and retain as a matter of convenience, solely for the benefit of such partnership enterprise, title to such 3-D camera process inclusive of the physical camera equipment and accessories thereof, and the exclusive patent and licensing rights pertaining thereto; that defendant Milton L. Gunzburg should attend to and render his services in relation to technical developments of such 3-D proc-

ess; that plaintiff Schaefer should attend to and render his services in relation to the business aspects of the partnership enterprise. . . ." [R. p. 9].

Paragraph Thirty-Seventh states, in part, as follows:

"Defendant Milton L. Gunzburg further breached the aforementioned partnership contract and further violated plaintiff's rights by virtue thereof, in that defendant Milton L. Gunzburg on or about March 30, 1953 denied that plaintiff had any interest as a partner. . . ." [R. p. 28].

2. Further, the complaint does *not* allege a promise by defendant Milton L. Gunzburg to pay plaintiff a sum equal to 50% of the profits, or 50% of the profits derived from the venture, as appellant would have the Court believe. Instead it alleges that net profits of the partnership were to be shared *equally* between the two alleged partners after certain percentages were allocated to others.

Paragraph Nineteenth of the complaint states, in part, as follows:

"In such contract it was further agreed that the net profits of the partnership enterprise would be divided in equal shares between plaintiff Schaefer and defendant Milton L. Gunzburg subject only to the disposition of small percentage interests in the profits . . . and defendant Milton L. Gunzburg specifically assured plaintiff, that in no event would the disposition of such small percentage interests in the net profits to such other four persons exceed an aggregate of Fifty (50%) Per Cent of the net profits" [R. pp. 11, 12].

Paragraph Eighteenth of the complaint states as follows:

"In such contract it was further agreed that plaintiff would bear whatever expenses as might be in-

curred by plaintiff and that defendant Milton L. Gunzburg would bear whatever expenses as might be incurred by such defendant Milton L. Gunzburg, subject to the rights of both partners to a reappraisal at a later date of their respective expenditures on behalf of the partnership enterprise and any reciprocal adjustments as might then be warranted" [R. p. 10].

3. There is *no* allegation in the complaint that plaintiff was damaged in a sum certain, or in the amount of 50% of the net profits, or a sum equal thereto, or in any amount.

Moreover, the complaint contains no prayer for a money judgment for 50% of the net profits, or a sum equal thereto. In no sense was the action brought for "damages for breach of contract."

On the contrary, consistent with the allegations of the complaint in regard to profits the prayer asks:

"13. That the properties and profits of such Natural Vision partnership enterprise, after payment of the partnership debts and liabilities, be divided equally between plaintiff Schaefer and defendant Milton L. Gunzburg, according to their respective interests;" [R. p. 38].

4. The complaint does not confine the relief sought to money allegedly earned *prior* to the filing of the complaint as appellant implies by stating in his brief that

". . . The complaint alleged that the business had earned profits in excess of \$6,000,000.00, . . ."²

²Appellant's Opening Brief, Argument, A.1., pp. 22-23.

In fact the complaint sought *prospective* relief to the time of the decree (which only equity could give), alleging in Paragraph Thirty-Fifth, in part, as follows:

“ . . . all of such additional substantial proceeds and gross profits plaintiff estimates *will be* in the aggregate of between Six Million (\$6,000,000.00) Dollars and Eight Million (\$8,000,000.00) Dollars” [R. p. 25] (emphasis added).

The *only* reference in the entire complaint to money damages is in paragraph 15 of the *prayer* [R. p. 39]. *There are no allegations of damage in the body of the complaint.* This prayer necessarily, therefore, is a demand for *incidental* money damages to the extent equitable relief might prove inadequate. Appellant does not rest his argument in any way upon this demand, since his argument is directed to the fictitious promise to pay 50% of profits.

5. Finally, appellant's attenuated summary omits the many equitable claims asserted against the various defendants as the basis for following assets into their hands. Also omitted is the fact that *the relief* sought in the action was *exclusively* equitable [Prayer, R. pp. 34-39].

C. The Original Complaint Is a Classic Equitable Action Which Could Only Be Tried in Equity in View of the Alleged Partnership Relation, the Equitable Rights Asserted, and the Remedial Relief Sought.

1. IN DETERMINING WHETHER THE CLAIMS AND ISSUES WERE BASICALLY EQUITABLE OR LEGAL THE COURT CONSIDERS BOTH THE ALLEGATIONS OF THE COMPLAINT AND THE RELIEF DEMANDED.

Appellant argues that the Court's order for a separate and prior trial of the issue of the existence of the partnership relation (which he calls the "agreement") converted that issue into a legal issue. This resulted, he argues, because other issues, including those relating to relief, were separated for later disposition after the Court first determined whether or not there was a partnership³ (and thereby ascertained if plaintiff had *any* right to relief.)

On this appeal the Court is not concerned with whether a jury or judge is a better trier of fact—the question is one of *right* to jury trial. A plaintiff has such right only as to matters asserted in the complaint over which equity did not have jurisdiction at the time the Seventh Amendment was adopted.

Appellant's argument is fallacious in the first place because the relief demanded in the complaint necessarily affects the fundamental question of whether the action is legal or equitable. A bologna cut in half is still bologna. A historic equity action tried in two phases remains an equity action.

An illustration of the way the relief demanded determines the character of the action is an action for specific performance of a contract.

³Appellant's Opening Brief, Argument B., p. 32.

Such an action is equitable. However, if a demand for money damages were substituted for the equitable relief the action would become legal.

Canister Co. v. Leahy (3 Cir.), 182 F. 2d 510, cert. den. 342 U. S. 893, 72 S. Ct. 201, 96 L. Ed. 669;

5 Moore's Federal Practice, Section 38.17, page 158.

The granting of a separate trial under Rule 42(b) of the Rules of Civil Procedure is a purely procedural matter and has no bearing upon, and does not change, the character of the complaint as appears from its allegations and prayer, which are the "proving grounds" for determining the right to jury trial.

Fraser v. Geist (D. C., Pa.), 1 F. R. D. 267, 269.

The remedies sought necessarily affect whether an action is historically legal or equitable, because the function of equity was to give relief where the legal remedy was inadequate.

Johnson v. Gardner (9 Cir.), 179 F. 2d 114, 116-117;

Bellavance v. Plastic-Craft Novelty Co. (D. C., Mass.), 30 Fed. Supp. 37, 39;

Upjohn Co. v. Schwartz (D. C., N. Y.), 117 Fed. Supp. 292.

Appellant erroneously assumes that because a legal right to damages may arise from a contract, equity does not have jurisdiction to ascertain the legal rights as the basis for equitable relief.

The contrary is true, for equitable jurisdiction is exclusive if the relief sought is equitable although the right involved is legal.

1 Pomeroy's Equity Jurisprudence, Fifth Edition, Section 138, pages 189-190, states:

“The exclusive jurisdiction includes, *secondly*, all civil cases in which the remedy to be granted—and, of course, the remedial right—is purely equitable, or one which is recognized and administered by courts of equity, and not by courts of law. In the cases of this class, the primary right which is maintained, redressed, or enforced is sometimes equitable and is sometimes legal; but the jurisdiction depends, not upon the nature of these rights, estates, or interests, but wholly upon the nature of the *remedies*. Cases in which the remedy sought and obtained is one which equity courts alone are able to confer must, upon any consistent system of classification, belong to the *exclusive* jurisdiction of equity, even though the primary right, estate, or interest of the party is one which courts of law recognize, and for the violation of which they give *some* remedy. *Thus a suit to compel the specific performance of a contract falls under the exclusive jurisdiction of equity, although a legal right also arises from the contract, and courts of law will give the remedy of damages for its violation. . . .*” (Emphasis added.)

Secondly, in trying the “existence,” “nature and character” of the alleged partnership agreement, the trial court here was exercising equitable jurisdiction apart from the restorative remedial relief sought. Appellant sought a declaration of his rights [R. p. 34, par. 1, Prayer]. One class of equitable remedies is the declaration and establishment of rights and interests, legal or equitable.

1 Pomeroy's Equity Jurisprudence, Section 171, par. 3, pages 228-229.

We know of no authority supporting plaintiff's illogical argument that a separate trial of various parts of a case changes an equitable action into a legal one by the mere fact of the separation order. None of the cases he cites does so. They hold only that a party is entitled to trial of legal issues by a jury although equitable issues are **joined** in the same action.⁴

For example, *Keene v. Hale-Halsell Co.* (5 Cir.), 118 F. 2d 332, cited in Appellant's Opening Brief, page 33, was an action by a creditor to recover a debt and to pursue property fraudulently transferred to apply against the debt. The Court held it was not necessary to exhaust the remedies at law available to a creditor by first obtaining a money judgment before suing in equity, because legal and equitable issues could be tried in one action under the reformed procedure.

H. B. Zachry Co. v. Terry (5 Cir.), 195 F. 2d 185, cited in Appellant's Opening Brief, page 34, *actually held that the plaintiff did not have the right to jury trial*, because of the complex nature of the accounting demanded.

Bruckman v. Hollzer (9 Cir.), 152 F. 2d 730, upon which appellant relies so heavily, is not even in point on this issue. In that case the complaint alleged three counts, the first, a claim for damages for copyright infringement; the second, an accounting for profits from appropriation of copyright; the third, injunction against continued infringement of copyright.

All three claims involved a common question of fact, *i. e.*, whether there was infringement. All parties were agreed that the first claim, if tried separately, would be a

⁴Cases cited in Appellant's Opening Brief, pp. 32-35.

legal claim upon which there was a right to jury, and that the two remaining claims were equitable.

The two questions involved in the case were (1) whether combining the legal claim with the equitable claims deprived plaintiff of a right to jury trial on the legal claim and (2) since there was a common question of fact, *i. e.*, infringement, upon which all three claims rested, whether the legal claim or the equitable claims should be tried first.

The court held that *a joinder of a legal claim for damages with equitable claims did not deprive the plaintiff of a right to jury trial on his legal claim.*

2. THE COMPLAINT IS COGNIZABLE SOLELY AND IN ENTIRETY IN EQUITY FOR THE FOLLOWING REASONS:

- a. *Basically, the Action Is by an Alleged Partner for Dissolution of a Partnership, Winding Up of the Partnership Business and Recovery of His Share of Its Profits and Properties. Prior to an Accounting and Settlement, Which Were Sought in the Action Itself, Appellant Was Precluded From Suing at Law.*

40 American Jurisprudence, Partnership, Section 461, page 450, states:

“... Where there has been no settlement of partnership affairs, the remedy of one partner against his copartner for conversion of the firm property by the latter is in equity, and not by way of an action at law for damages. Also, when the partner seeks to recover from the copartner a share of the partnership profits, he must resort to an action in equity, and cannot as a general rule bring an action at law. . . .”

See, also, text discussions and cases cited:

68 C. J. S., Partnership, Section 110(a), p. 552, which states the reasons for the rules, and Section 112, p. 555;

Pomeroy's Equity Jurisprudence, Vol. 4, Fifth Ed., Section 1421, p. 1078;

168 A. L. R., 1088, 1091, "Partnership-Action between partners."

California authority is completely in accord:

Dukes v. Kellogg, 127 Cal. 563, 60 Pac. 44;

Johnstone v. Morris, 210 Cal. 580, 292 Pac. 970;

Hadley v. Ellis, 123 Cal. App. 2d 758, 267 P. 2d 442;

Cunningham v. deMordaigle, 82 Cal. App. 2d 620, 186 P. 2d 423.

The complaint falls squarely within these principles. There is nothing in the complaint to bring it within any exceptions to the general rule.

The cases which appellant cites⁵ merely involved the question of whether it was permissible for the trial court to give a money judgment in a particular case without requiring an accounting between joint venturers. In each case the court accepted the general rule we have stated but found it inapplicable to the particular facts.

In the *Barlin* case the joint venture was terminated and dissolved. The suit was for a sum certain and the court

⁵*Barlin v. Barlin*, 145 A. C. A. 456, 459-460, P. 2d, (Oct. 24, 1956); (Appellant's Op. Br. p. 24).

Elsbach v. Mulligan, 58 Cal. App. 2d 345, 369-370, 136 P. 2d 651. (Appellant's Op. Br. p. 24.)

found specifically that an accounting was not necessary. The *Elsbach* case similarly is not applicable. Basically it was an action for damages by one joint venturer against another for wrongfully inducing termination of contractual relations with the joint venture by third persons.

b. *All of the Remedies Requested by Appellant Were Equitable, With Money Damages Merely Incidental to Equitable Relief and Dependent Thereupon.*

The general rule is that equity "having properly acquired jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law."

Greene v. Louisville & Interurban Railroad Co.,
244 U. S. 499, 520, 37 S. Ct. 673, 682, 61 L. Ed.
1280, 1291.

There is no right to a jury trial on any issue of damages that is *incidental* to the equitable relief which the claimant seeks.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 40, 49, 57 S. Ct. 615, 81 L. Ed. 893;

Johnson v. Gardner (9 Cir.), 179 F. 2d 114, cert. den.; 339 U. S. 935, 70 S. Ct. 661, 94 L. Ed. 1353;

5 Moore's Federal Practice, Section 38.19(2), page 169.

The only prayer for money damages in the complaint is in paragraph 15 thereof [R. p. 39]. The complaint itself does not contain any allegation of damages in its averments. Of necessity, the amount of money damage in this case would depend upon the extent to which equitable

relief might be adequate. If profits were available, they would be ordered to be paid over. If not, money damages to the extent necessary would be a substitute, and the same applies to the assets and properties of the business.

Plaintiff directly alleged as much by pleading:

“Forty-Fourth: Plaintiff does not have any adequate remedy at law” [Cmplt., par. Forty-Fourth, R. p. 34].

The cases hold that such an allegation constitutes *an election* for suit in equity, *eliminating* any right to a jury trial.

Arnstein v. Twentieth-Century Fox Film Corporation (D. C., N. Y.), 3 F. R. D. 58, 59;

Young v. Loew's Inc. (D. C., N. Y.), 2 F. R. D. 350.

Appellant's argument⁶ that, as a matter of substantive law, an agreement to pay a person a share of profits as compensation is enforceable even if the parties are not partners, is, of course, undisputed. However, whatever the merits of such a *hypothetical case*, *here* plaintiff alleged a *partnership* and sought rights and remedies of a partner. Having lost after a full and fair trial, appellant may not now collaterally attack and go behind his own pleadings; for the right to a jury trial is judged from the *allegations and prayer* of the complaint.

Canister Co. v. Leahy (3 Cir.), 182 F. 2d 510, 513;

Ring v. Spina (2 Cir.), 166 F. 2d 546, 549.

⁶Appellant's Opening Brief, p. 25.

- c. *Even Viewed Solely as an Action for an Accounting and Ignoring the Basic Equitable Character of the Proceeding, Plaintiff Would Not Be Entitled of Right to Jury Trial. The Accounting Was Not Merely for Purposes of Calculating the Amount of a Money Judgment. The Accounting Involved and Was Dependent Upon Equitable Relief, Pertained to Mutual Accounts and Third Persons and Was Too Complex for Trial by Jury.*

In regard to an accounting the prayer of the complaint requests (1) that defendant Milton L. Gunzburg account for “all assets, profits and effects of such partnership enterprise,” and that he be declared a trustee “*ex-maleficio*” thereof [R. p. 37, par. 10]; (2) that the remaining defendants each be required to account for assets and profits of the “Natural Vision partnership enterprise” and that they be declared trustees *ex-maleficio* thereof [R. pp. 37-38, Prayer 11]; (3) that each defendant be ordered to pay over to the partnership all assets and profits thereof withheld from the partnership [R. p. 38, Prayer 12], and (4) that partnership debts be paid and the assets and profits thereafter divided between plaintiff and defendant Milton L. Gunzburg [R. p. 38, Prayer 13].

Despite the complicated relief sought by this prayer, appellant would have this Court believe that his complaint simply sought to enforce a personal promise to pay as compensation for services a sum equal to 50% of the profits of another’s business.⁷

Clearly the accounting sought by the prayer was not as the basis for a money judgment, for consistent with his partnership theory plaintiff asked that the assets and

⁷Appellant’s Opening Brief, p. 1.

profits be turned over to the alleged partnership, and that *debts* and *liabilities* thereof be paid *before* distribution to the alleged partners. A partner's claim for his share of profits is merely an item in the firm account and a settlement must be had before he can recover any specific sum.

Cohen v. Erdle, 126 N. Y. S. 2d 32, 34, 282 App. Div. 569, 168 A. L. R. 1088, 1094—Anno.—
Partnerships—Actions between partners.

Involving, under the allegations of the complaint here, numerous defendants and an adjustment of accounts between the alleged partners, the accounting could *only* be had in equity.

In his action appellant sought to have turned over to the partnership assets of various corporate defendants, assets held by defendant Milton L. Gunzburg in his own name and allegedly equitably owned by the partnership. Plaintiff's claim was equitable in nature and equitable relief would be required to reach the assets.

Even where the underlying claim is legal and there is a bare contract to pay a sum of money which can only be determined by an accounting if the issues are too complicated for a jury, so that the legal remedy is inadequate, the court may deny jury trial.

In *Kirby v. Lakeshore & M. S. R. R. Co.*, 120 U. S. 130, 134, 7 S. Ct. 430, 432, 30 L. Ed. 569, the Supreme Court said:

“The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity.”

Accord:

H. B. Zachry Co. v. Terry (5 Cir.), 195 F. 2d 185, action by an employee for 50% of profits of farm pursuant to contract;

Balfour v. San Joaquin Valley Bank (C. C. N. D., Cal.), 156 Fed. 500, action by a depositor against a bank for wrongful diversion and misapplication of funds—contains excellent review and analysis of problem;

5 Moore's Federal Practice, Section 38.25, pages 198-202;

4 Pomeroy's Equity Jurisprudence, Section 1421, page 1077.

It is true, as the authority cited at page 26 of Appellant's Opening Brief holds, that an account to ascertain damages may be had in some cases at law where the underlying claim is legal.

For example:

Ex parte Peterson, 253 U. S. 300, 64 L. Ed. 919, 40 S. Ct. 543, was an action to recover the balance due for goods sold and delivered.

Mounger v. Wells (5 Cir.), 23 F. 2d 374, was an action by brokers to recover a sum certain which was the alleged balance owing on a commissions account. No discovery or accounting was sought.

However, the foregoing case, as well as *United States v. Sinclair Prairie Oil Co.* (D. C., Okla.), 21 Fed. Supp. 179, acknowledge that where the accounts are complex, the action is equitable because the legal remedy is inadequate.

Bercovici v. Chaplin (D. C., N. Y.), 3 F. R. D. 409, is not in conflict. The court merely found it practical for

the jury to ascertain the damages where the contract involved there required payment of a fixed percentage of gross receipts, and there was no interdependence between the equitable and legal claims asserted in the complaint.

The remaining cases cited by appellant are similar, involving claims based on traditional legal rights and simple accounts and fall in that narrow area where the legal relief at old common law was considered adequate.

Appellant *acknowledges* that “accounting actions” are within *the concurrent jurisdiction* of law and equity.⁸

The Supreme Court has held, referring to the Seventh Amendment:

“. . . This provision, correctly interpreted, cannot be made to embrace the established, exclusive jurisdiction of courts of equity, *nor that which they have exercised as concurrent* with courts of law but should be understood *as limited* to rights and remedies *peculiarly* legal in their nature; . . .” (Emphasis added.)

Shields v. Thomas, et al., 18 How. 253, 262, 59 U. S. 253, 15 L. Ed. 368, 372.

See, also:

Fitzpatrick v. Sun Life Assur. Co. of Canada (D. C., N. J., 1941), 1 F. R. D. 713, 716.

The Supreme Court has also held, in *United States v. Louisiana*, 339 U. S. 699, 706, 94 L. Ed. 1216, 1220, 70 S. Ct. 914:

“Louisiana’s motion for a jury trial is denied. We need not examine it beyond noting that this is an

⁸Appellant’s Opening Brief, p. 27.

equity action for an injunction and accounting. The Seventh Amendment and the statute, assuming they extend to cases under our original jurisdiction, are applicable only to actions at law. See *Shields v. Thomas* (U. S.), 18 How. 253, 262; 15 L. Ed. 368, 372; *Barton v. Barbour*, 104 U. S. 126, 133, 134, 26 L. Ed. 672, 676, 677.”

In conclusion, so clearly does the complaint seek relief available only in equity that appellant in his brief was obliged to distort the contents of his complaint before he could make his argument. His appeal may well be deemed frivolous.

Because appellant’s entire argument is grounded on an inaccurate summary of his complaint, his argument, viewed in the light of the true facts, has no substance.

The complaint itself, as opposed to appellant’s representation of its terms, is a classic equitable action upon which there is no right to jury trial.

That certain factual issues were tried first, as a matter of convenience, is entirely immaterial to the right of jury trial.

II.

Even Where Evidence Is Conflicting, if Reasonable Men Cannot Differ as to the Conclusion to Be Drawn From the Evidence, a Directed Verdict Must Be Granted. The Evidence in This Case That There Was No Partnership Agreement as Claimed by Appellant, Is of Such Nature Here. Accordingly, Had There Been a Jury, a Directed Verdict for the Appellees Would Have Been Proper.⁹

Appellant concedes (p. 9 of his Brief) that before he can request the favorable consideration of this Court, he must show from the record that the evidence would not have permitted the direction of a verdict against him.

He must, also, of course, overcome Title 28, United States Code, Section 2111:

“On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”

The cases are clear that even where there is a conflict in evidence, if reasonable men cannot differ, or if the evidence is so overwhelmingly on one side, a directed ver-

⁹Appellees respectfully submit that the pleadings themselves conclusively establish the equitable nature of appellant's complaint and are decisive against him of the issue on appeal. The presentation of further arguments arises from the belief that the Court should properly have before it all the reasons which support affirmance of the judgment below.

dict is proper. Where a directed verdict would have been proper, denial of a jury trial is not reversible error.

Southern Pacific Company v. Pool, 160 U. S. 438, at 440 and 40 L. Ed. 485, 487, 16 S. Ct. 338;

Backus v. Taplin (7 Cir.), 81 F. 2d 444, at 447, and particularly the last paragraph on p. 449;

Pacific Can Company v. Hewes (9 Cir.), 95 F. 2d 42, at 46, Pars. (8, 9), and p. 45, Pars. (1-37);

Berkeley Pump Co. v. Jacuzzi Bros., Inc. (9 Cir.), 214 F. 2d 785, at 791;

Burke Grain Co. v. St. Paul-Mercury Indemnity Co. (8 Cir.), 94 F. 2d 458 at 463, cert. den., 303 U. S. 661, 82 L. Ed. 1120, 58 S. Ct. 765 (p. 463):

“But, while it was error in the court to hold that the defendant had waived its right to a jury trial by interposing its motion with reservations for a directed verdict, it does not follow that this error resulted in prejudice to the defendant or requires a reversal. It could only be prejudicial if there were in fact substantial evidence upon which the jury might properly have returned a verdict in favor of the defendant. As said by us in *General Tire Co. v. Standard Accident Ins. Co.*, *supra*: ‘However, although taking the case from the jury was erroneous, nevertheless “the verdict will be sustained if the evidence was of such a conclusive character that it would have been the duty of the court to set aside the verdict had it been for the other party.” *Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co.*, *supra* (210 U. S. 1, 28 S. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70).’ ”

A decision of a judge in taking a case from a jury will be accorded great respect, even in a conflict of evidence case.

Patton v. Texas and Pacific Railway Company,
179 U. S. 658, at 660, 45 L. Ed. 361, at 363,
21 S. Ct. 275.

On the Issue of the Existence of the Alleged Partnership Agreement, it is Patent that Reasonable Men Could Not Differ from the Finding that THERE WAS NO PARTNERSHIP AGREEMENT AS PLEADED BY APPELLANT. [Findings, Pars. VII, VIII, IX, X, XI, R. pp. 103-106.] Conclusive Evidence against Appellant Stems from his own Testimony.

In his pleadings appellant claimed that: he was an experienced business man; Gunzburg had no business experience; appellant would conduct all the business affairs of the alleged partnership and Gunzburg would devote his attention to the technical end [R. pp. 7, 9].

Now, let us examine this claim in the light of appellant's own testimony.

The most vital contract in Gunzburg's business was his exclusive franchise to sell Polaroid viewers, without which an audience could not view three-dimension motion pictures. Appellant not only did not negotiate this agreement (it was exclusively negotiated by Gunzburg), appellant never even saw a copy of the contract [R. pp. 267-269, 410-411, 1256-1257].

The next most important agreement in Gunzburg's business was the initial licensing agreement for use of the Natural Vision process between Gunzburg and Arch Oboler. This was negotiated entirely by Gunzburg and his attorney, William Hinckle. Appellant did not even

know Oboler at the time it was negotiated [R. pp. 303, 305-306].

Another important agreement for the use of appellee's process was the Warner Bros. licensing contract. Appellant did *not* negotiate this or any other licensing agreement for the use of the Natural Vision process [R. pp. 409-410].

Appellant signed no contracts on behalf of Natural Vision [R. p. 411]. He did not hire or fire help for Natural Vision [R. p. 411]. He had no authority to, nor did he, issue any checks for Natural Vision [R. p. 411]. Appellant never received any information whatsoever as to the bank accounts of Natural Vision [R. p. 411].

Appellant never attended a Board of Directors meeting of Natural Vision Corporation [R. p. 411]. Appellant never held title to any Natural Vision properties [R. p. 411].

Appellant conducted his various business enterprises from his New York office. Although he listed his various enterprises on his door or in the lobby index, he never used the name of Natural Vision [R. p. 412].

Appellant had different letterheads for his various business enterprises but he never used the name Natural Vision on any stationery [Ex. N; R. pp. 412-413].

Although he was familiar with the laws of New York requiring corporations to qualify to do business in New York appellant never qualified Natural Vision Corporation [R. p. 412]. Appellant was also familiar with the laws of New York requiring partnerships operating in New York to file a certificate in that state, but he never filed one for his alleged partnership with Gunzburg [R. pp. 413-414].

Appellant never asked to see any of the business records of Natural Vision [R. p. 414]; never inspected any records of Natural Vision [R. p. 414]; never asked for or received any bank statements of Natural Vision [R. p. 414]; and never received any of the profits of Natural Vision [R. p. 414]. Indeed, *he did not at any time even inquire* if Natural Vision was making or losing money [R. p. 522].

Although he filed income tax returns for the years in question (1951, 1952 and 1953) appellant did not indicate in any of them that he had a partnership with Gunzburg or Natural Vision [R. p. 414]. And, despite the fact that Gunzburg's expenditures exceeded \$70,000.00, appellant never contributed any capital to Natural Vision [R. pp. 415; 1203-1205; 1611, 1636].

One of Gunzburg's principal activities was selling Polaroid viewers. Appellant negotiated to go into such a business *in competition to Gunzburg* [R. pp. 449-451]. Appellant had conversations with the Polaroid Company, the source of Gunzburg's viewers, ascertained that it was not going to renew its agreement with Gunzburg, and, without disclosing this to Gunzburg, gave Polaroid advice on how it could distribute its viewers through outlets other than Gunzburg [R. pp. 451-463].

Appellant knew that part of the business activity of Natural Vision was selling projection booth equipment for 3-D cameras, but he advised his associates to give their business to Altec and RCA, competitors of Natural Vision [R. pp. 471-472].

Perhaps most significant of appellant's lack of good faith and lack of belief that he had a partnership agreement, is his own testimony concerning a commission he received for selling, as agent, the first 3-D motion picture, BWANA DEVIL. In his complaint appellant alleged that he and Gunzburg were to form a partnership for the purpose of commercially exploiting the licensing, manufacture and use of the 3-D camera process [par. Sixteenth; R. pp. 8-9]. And he alleged in Paragraph Nineteenth:

"In such contract it was further agreed that the net profits of the partnership enterprise would be divided in equal shares between plaintiff Schaefer and (8) defendant Milton L. Gunzburg . . ." [R. p. 10.]

BWANA DEVIL was the first motion picture resulting from Gunzburg's Natural Vision process. On Gunzburg's recommendation, appellant was hired by the producer, Arch Oboler, to supervise distribution. His contract provided that if he sold the picture, instead of supervising its distribution, appellant was to receive a 5% commission. He actually received between \$83,000.00 and \$84,000.00 for making a sale. Concerning this money the appellant testified as follows:

"Q. (By Mr. Groman): Now, Mr. Schaefer, this was monies received from the production and exploitation of a motion picture in 3-D. Now is it your understanding that any of that \$83,000.00 that you received belongs to Mr. Gunzburg pursuant to the

alleged partnership agreement you had with him?
A. No, sir.

Q. You never offered to give Mr. Gunzburg any of that money, did you? A. No, sir.” [R. p. 308.]

Capping this most damaging admission is the undisputed fact that *Gunzburg bore 20% of the \$83,000.00 commission paid to appellant and appellant was fully aware of this.*¹⁰

As a climax to his admissions appellant testified as follows concerning his final meeting with Gunzburg:

“Q. I will ask you, Mr. Schaefer, if at that meeting that you stated you felt you had 25 per cent of the stock coming, and that the real fact is that when this was denied you said, ‘Just for that, Milton, I am going to ask for 50 per cent.’ Did you make that statement? A. Yes, I did.”

Certainly in the light of all this testimony which comes from the lips of appellant himself, reasonable men could not differ from the conclusion that not only was there no partnership agreement but *appellant himself did not even believe that there was one.*

¹⁰Record, pp. 317-339, note particularly pp. 327-328. The self contradiction and impeachment of appellant by his own testimony illustrated in the record cited immediately above, continued throughout his testimony. See, for example, Record, pp. 250-269, 339-344, 406-409. It is no wonder that the Court in its opinion stated that he “placed little credence upon the testimony of the plaintiff.” [R. p. 100.]

III.

Appellant by His Own Uncontradicted Testimony Has Established That He Was Guilty of "Unclean Hands." Under the Law the Courts Are Closed to Him "in Limine." Since the Burden of Showing That He Has Clean Hands Is on Appellant, and He Has Made No Effort in His Appeal to Overcome His Unclean Hands, He Has Waived Any Right to Be Heard by This Court.

The rule that a plaintiff must enter a court of equity with clean hands has been called "the most important rule affecting the administration of justice."

Katz v. Karlsson, 84 Cal. App. 2d 469, 474, 191 P. 2d 469.

The fundamental principle of law that any unconscionable conduct of a plaintiff, connected with the controversy, will repel him from the Court, *in limine*, is comprehensively set forth in the leading California case of *De Garmo v. Goldman*, 19 Cal. 2d 755, at 764-765, 123 P. 2d 1.

The United States Supreme Court is in accord.

Keystone Driller Company v. General Excavator Company, 290 U. S. 240, 244, 78 L. Ed. 293, 296.

See, also:

Singer v. A. Hollander & Son (3 Cir.), 202 F. 2d 55, 59;

Ford v. Buffalo Eagle Colliery (4 Cir.), 122 F. 2d 555, 562, 563.

The doctrine of unclean hands is not merely a matter of defense but is a rule invoked for the protection and dignity of the courts which will refuse to render their assistance to persons guilty of unconscientious conduct.

Bennett v. Brown, 206 Cal. 424, 274 Pac. 532;

Baar v. Smith, 97 Cal. App. 398, 275 Pac. 861;

Young v. The Young Holdings Corp., Ltd., 27 Cal. App. 2d 129, 80 P. 2d 723;

Hyland v. Millers Natl. Ins. Co. (9 Cir.), 91 F. 2d 735, 739, reh. den. 92 F. 2d 462 (cert. den.), 303 U. S. 645, 82 L. Ed. 1107, 58 S. Ct. 644.

It is not merely a matter of discretion, but the *duty* of a court of equity, upon a suggestion of lack of good faith, to inquire into the facts in regard thereto.

Howe v. Brock, 86 Cal. App. 2d 271, 194 P. 2d 762.

The California Supreme Court has pointed out in *De Garmo v. Goldman*, 19 Cal. 2d 755 at 765, 123 P. 2d 1, that the *burden of proof is on the plaintiff* to prove his clean hands before he may be heard to assert any rights.

The doctrine of unclean hands is not confined to any particular type of proceeding. Rules of Civil Procedure, Rule 8, (e), (2) provides as follows: “. . . A party may also state as many separate claims or defense as he has regardless of consistency and whether based on *legal or on equitable* grounds or on both. . . .” (Emphasis added.)

Jessen v. Aetna Life Ins. Co. (7 Cir.), 209 F. 2d 453, 458;

Ettelson v. Metropolitan Life Ins. Co. (3 Cir.), 137 F. 2d 62, 64, (cert. den.) 320 U. S. 777, 88 L. Ed. 467, 64 S. Ct. 92.

It is equally clear under California law that equitable defenses are not confined to equity suits.

Morrison v. Willhoit, 62 Cal. App. 2d 830, at 838;
145 P. 2d 707;

Richman v. Bank of Perris, 102 Cal. App. 71, 83;
282 Pac. 801;

See also:

Restatement of Agency, Sec. 469, p. 1102;

Lamdin v. Broadway Surface Advertising Corp.,
272 N. Y. 133; 5 N. E. 2d 66 at pp. 66-67;

Raymond v. Davies, 293 Mass. 117; 199 N. E. 321;
102 A. L. R. 1112.

So that even *assuming for the purposes of argument* that the action below were legal instead of equitable, the doctrine of unclean hands would have been a proper defense.

Facts.

The facts as to appellant's unclean hands are not in dispute. They come from appellant's own testimony and writings and from the testimony of his witnesses; and there is no contrary evidence.

All of this evidence must be considered in the frame of reference created by appellant's allegations in his complaint that he was Gunzburg's partner. For the purpose of *evaluating* his conduct *appellant must*, of course, *be deemed bound by his allegations*.

Appellant was aware that Gunzburg was engaged in the sale, installation and servicing of equipment for the

projection of 3-D motion pictures [R. p. 472]. Nevertheless, appellant agreed to furnish competitors of Gunzburg, Altec and RCA, with a list of theatres needing such equipment and even wrote a form of announcement to the press concerning this arrangement [R. pp. 470-472; Deft. Ex. R].

Appellant knew that Gunzburg was engaged in the business of selling Polaroid viewers and *claimed* to have an interest in such business [R. p. 449]. Yet, appellant actively discussed with Arch Oboler going into the viewer business in competition with Gunzburg [R. p. 450]; and he conducted an investigation into sources of supply for this competitive business [R. pp. 451-452].

Gunzburg secured his viewers, as appellant full well knew, from the Polaroid Company [R. p. 453]. Nevertheless, appellant secretly met with officials of the Polaroid Company, ascertained they did not propose to renew their contract with Gunzburg, and not only did not communicate this vital information to Gunzburg, but advised the Polaroid people whom they should turn to in place of Gunzburg [R. pp. 453-463. And compare, particularly, appellant's testimony on page 461 with the testimony of his own witness, Arch Oboler, R. pp. 1092-1093].

Appellant *claimed* to be Gunzburg's partner in a 20% ownership in the profits of the first 3-D motion picture BWANA DEVIL. Nevertheless, while acting as agent *to sell* the picture to United Artists and without any disclosure to Gunzburg, appellant negotiated secretly to join with

United Artists *in buying* the picture.¹¹ In addition to appellant's conduct as agent in the ultimate sale of BWANA DEVIL to United Artists at a price of \$1,750,000.00 [R. p. 325], his testimony revealed that his initial negotiations were with others who wanted to purchase the picture *at a much higher figure* [R. pp. 415, 420, 432-433].

At the point in the trial where this testimony was disclosed, counsel for appellees *proposed* to demonstrate by appellant's own testimony (it being indisputable by appellant since it was all contained in his own deposition which was filed with the court, [Dep. pp. 116-121; 559-643]) that appellant had initiated a secret scheme to kill higher offers by other purchasers so that he could secretly join with one Edward Alperson in buying the very picture he was entrusted, as agent, to sell. At no time did he disclose these secret negotiations to Gunzburg. As a result of appellant's scheme a \$2,500,000.00 and a \$2,000,000.00 offer were rejected, and, eventually, the picture was sold to United Artists for \$1,750,000.00, causing Gunzburg a loss of 20% of the difference between \$2,500,000.00 and \$1,750,000.00.

Counsel for appellees was directed by the Court to make an offer of proof on this point. This was done [R. pp. 415-449, particularly pp. 442-449].

¹¹Deposition of Seymour M. Peyser, p. 8 and Exhibit 1 to the said deposition, the said deposition being offered in evidence as *plaintiff's* Exhibit No. 52 [R. p. 668]; the portion of the deposition referred to is found on p. 673 of the Record. See also, deposition of Robert S. Benjamin, *plaintiff's* Exhibit No. 53, Record, p. 702 and Record, pp. 705-709.

Apart from the actual injurious results of appellant's various undisclosed schemes, and course of unconscientious conduct, the law is quite clear that it is not necessary for a party to succeed in unconscientious conduct in order to be guilty of unclean hands. The mere attempt is sufficient.

Belling v. Croter, 57 Cal. App. 2d 296 at 306; 134 P. 2d 532; and

Hyde Park Amusement Company v. Moglar, 358 Mo. 336; 214 S. W. 2d 541 at 545.

So paramount is the doctrine of unclean hands that it was considered and adopted as a ground for reversal in *De Garmo v. Goldman*, 19 Cal. 2d 755; 123 P. 2d 1, although it was not pleaded and was raised for the first time after the appeal was filed (See p. 771 of the dissenting opinion).

In the instant case the appellant's unclean hands were specifically pleaded as an affirmative defense [R. pp. 70, 73, 74], and during the trial evidence of the appellant's unclean hands was introduced through the testimony of appellant himself. This testimony stands uncontradicted on the record and appellant has made no effort to explain it away. Nor has he in any way attempted to justify it in his appeal.

Since there is no conflict in the evidence as to appellant's unclean hands, and since, patently, reasonable men could not differ that such conduct constituted unclean hands, as a matter of law, appellant can have no standing

to pursue his suit, either in the court below or here on appeal.

Rosenfeld v. Zimmer, 116 Cal. App. 2d 719; 254 P. 2d 137;

Belling v. Croter, 57 Cal. App. 2d 296; 134 P. 2d 532;

Hyde Park Amusement Company v. Moglar, 358 Mo. 336; 214 S. W. 2d 541, 544.

The trial court in his opinion made no ruling on the defense of unclean hands [R. p. 100]. Nevertheless, the existence of uncontradicted evidence establishing the fact of plaintiff's unclean hands may properly be directed to the attention of this court on appeal; for it is well established that if a party below is entitled to a directed verdict *on any ground*, a direction of a verdict in his favor will be sustained.¹²

Automobile Underwriters of Des Moines v. Bloemer (8 Cir.), 94 F. 2d 474, 477;

Smith v. S. S. Kresge & Co. (8 Cir.), 79 F. 2d 361; at 362, 363.

And generally see:

McCluer v. Heim-Overly Realty Company (8 Cir.).
71 F. 2d 100, at 101.

¹²This same principle of law applies equally, of course, to Argument II above.

Conclusion.

On the face of appellant's complaint, his action patently was equitable and not legal and so he was not entitled to a trial by jury. Even had he been entitled to a trial by jury, no prejudicial error resulted from the judgment of the court below, since, in any event, on undisputed and overwhelming evidence a direction of a verdict in favor of the appellees would have been proper on two distinct grounds.

For these reasons, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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Attorneys for Appellees.

No. 15208

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE J. SCHAEFER,

Appellant,

vs.

MILTON L. GUNZBURG, *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

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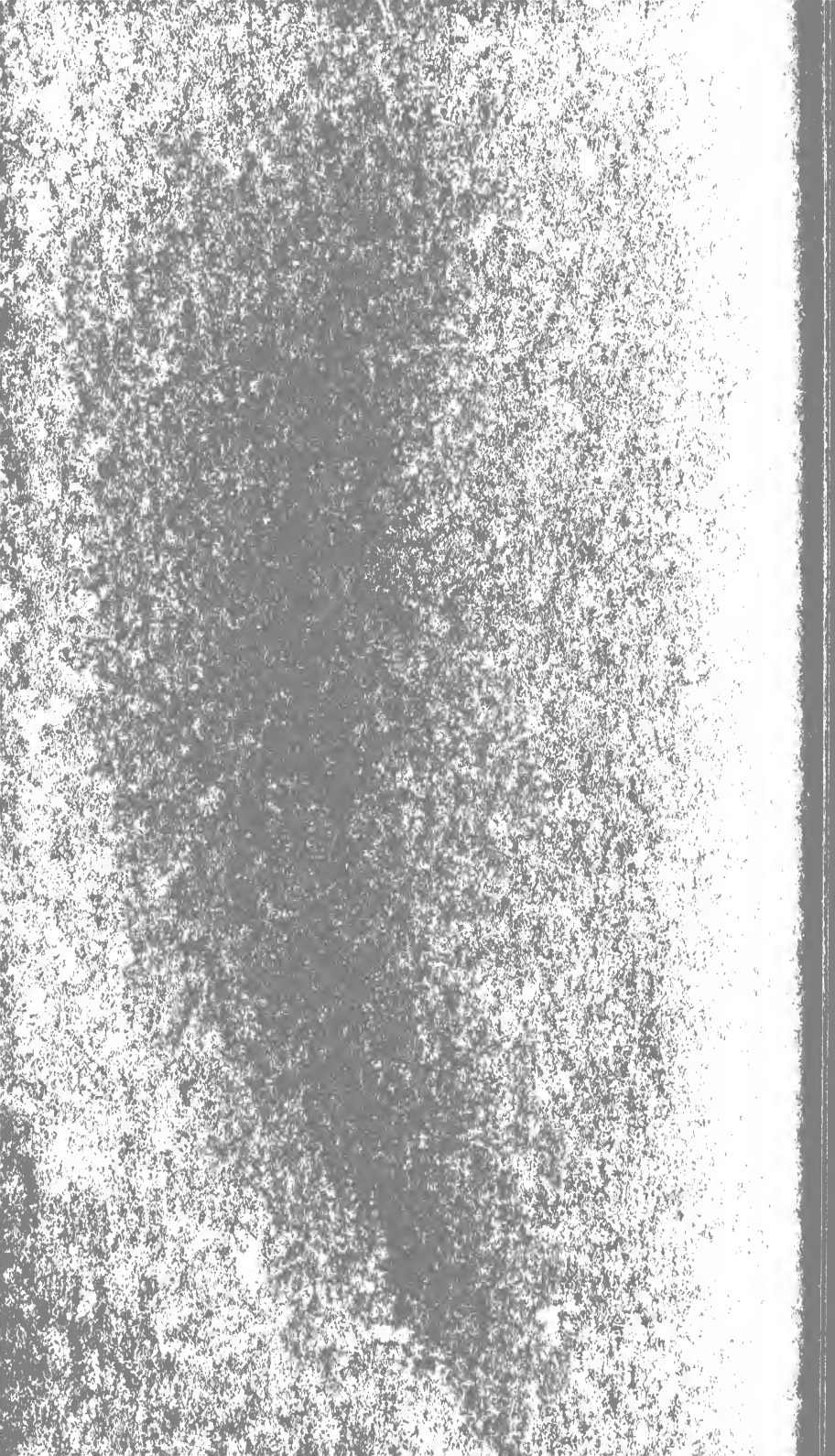
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Of Counsel.

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APPELLANT'S REPLY BRIEF.

I.

Where One Partner Has Wrongfully Terminated the Partnership, Arrogated to Himself the Partnership Assets and Profits, and Has Repudiated the Existence of the Partnership and Excluded the Other Partner Therefrom, an Action at Law May Be Maintained by the Wronged Partner for Damages and for the Partnership Profits of Which He Has Been Deprived.

As we have heretofore demonstrated, the allegations of the Complaint relative to the partnership between plaintiff and Gunzburg were but legal conclusions and, in part at least, the action was brought upon an oral agreement by which Gunzburg agreed to share his profits with plaintiff in return for the performance of the latter's services, regardless of whether or not the legal effect of that agreement was to create a partnership. As such, the parties were entitled to a jury trial upon those issues. (Op. Br. pp. 4-6, 24-35.) Appellees' Brief, however, stakes their defense of the trial court's action solely upon the ground that the Complaint alleged only a partnership, and that actions between partners may *never* be maintained at law.

(Ap. Br. pp. 23-37.) For purposes of this Reply Brief, therefore, we shall *assume* that the Complaint presented an action between partners; since, *even upon appellees' theory*, the action was nonetheless one at law, as to which the parties were entitled to jury trial.

It is true that, *as a general rule*, one partner to a *continuing* partnership may not sue another partner at law, but must bring his action in equity for dissolution of the partnership and settlement of the partnership accounts. *That rule, however, is not applicable to the case at bar.*

The application of the rule cited by appellees is dependent upon there being an existing and continuing partnership, which existence is not in issue between the parties; and that rule governs actions to redress the misconduct or wrongful acts of the defendant partner *in the conduct and operation of the existing partnership business*. The rule *does not apply* where the partnership has been dissolved or terminated, and the action is brought to recover a share of the partnership profits; nor does it apply where the action is brought for the wrongful and premature dissolution of the partnership by the defendant partner and for an aliquot share of the profits to which the plaintiff partner is entitled; nor does it apply to an action for damages and profits by a partner whose partnership interest has been repudiated or denied by his partners, and who has been by them excluded from the management and control of the partnership business, and where the assets and profits of the partnership have been converted to their own use by the erring partners. *In any of these circumstances, the wronged partner may maintain an action at law against his partners for damages and for his share of partnership profits.*

Zimmerman v. Harding, 227 U. S. 489, 494-495;
Karrick v. Hannaman, 168 U. S. 328, 337;
Johnstone v. Morris, 210 Cal. 580, 586, 292 Pac.
970;

Laughlin v. Haberfelde, 72 Cal. App. 2d 780, 787-790, 165 P. 2d 544;

Wilson v. Brozen, 96 Cal. App. 140, 143, 273 Pac. 847;

Moropoulos v. Fuller, 186 Cal. 679, 200 Pac. 601;

Barlin v. Barlin, 145 A. C. A. 456, 459-460,
P. 2d

Elsbach v. Mulligan, 58 Cal. App. 2d 354, 369-370, 136 P. 2d 651;

Cases Collected, 168 A. L. R. 1098-1099, 1106-1109.

That the case at bar is brought within these recognized exceptions to the general rule is readily demonstrable from the allegations of the Complaint. *Far from alleging the existence of a continuing partnership*, the Complaint alleged that the partnership had been repudiated and terminated by defendant Gunzburg. [R. 28.] Such unilateral conduct by one partner is sufficient to accomplish an immediate dissolution and termination of the partnership. (*Calif. Corps. Code*, Sec. 15031(2); *Karrick v. Hannaman*, 168 U. S. 328, 335-336.)

The Complaint further alleged that defendant Gunzburg repudiated the partnership and denied that plaintiff had any interest therein [R. 28]; and that Gunzburg excluded plaintiff from all participation in the conduct of the partnership business and arrogated to himself the sole management and control of the business, and converted to his own use all of the assets and profits thereof, with the conspiracy and connivance of the other defendants, and with the intent and design of depriving plaintiff of his rightful or any share of such assets and profits. [R. 28-34.] The Complaint prayed, among other things, for the share of partnership assets and profits of which plaintiff was thus deprived, and for money damages for the wrongful acts of defendants therein alleged. [R. 37, 39.]

These allegations, therefore, established plaintiff's action as one for damages and profits arising out of the wrongful dissolution and termination of the partnership, the repudiation of plaintiff's interest therein, and the exclusion of plaintiff from the management and control thereof; and not merely as an action for dissolution and settlement of an existing and continuing partnership.

That, upon the aforesaid allegations, an action lies at law, and not in equity, does not rest in doubt.

In the leading California case of *Laughlin v. Habermelde, supra*, 72 Cal. App. 2d 780, 787-790, plaintiff alleged the formation of a partnership with defendants to perform certain manufacturing contracts; the repudiation and dissolution of the partnership by defendants; the exclusion of plaintiff from the affairs of the partnership; and defendants' appropriation and conversion of the partnership assets and profits. Plaintiff sought judgment for, among other things, his rightful share of the partnership profits. The trial court sustained a demurrer to the complaint on the ground that, as the action was between partners, plaintiff's only remedy was by suit in equity for dissolution, whereupon plaintiff appealed.

The judgment was reversed by the District Court of Appeal on the ground that plaintiff had pleaded a cause of action at law and was not limited to suit in equity for dissolution. In an exhaustive review of the California authorities, the Court concluded that the general rule, limiting the plaintiff to equitable action for dissolution, is applicable only where the gravamen of the action arises "out of the manner in which a partnership business has been conducted," and that it did not and does not apply where the acts complained of resulted in a dissolution of the partnership, "and where the erring partner converts to his own use its entire assets." (72 Cal. App. 2d at 788.) In the latter case, the court held, plaintiff has a right of *action at law* for damages and

for recovery of his share of the profits and assets of the partnership.

Similarly, in *Wilson v. Brown*, 96 Cal. App. 140, 273 Pac. 847, wherein plaintiff alleged that defendant, her partner, had appropriated the partnership assets and profits to his own use and had denied the existence of the partnership and of plaintiff's interest therein and in the profits therefrom, the trial court entered a personal judgment against defendant for the amount of such profits. On appeal, defendant argued that the personal judgment was improper because plaintiff's only remedy was by suit in equity for a dissolution of the partnership and settlement of the partnership accounts.

In affirming the judgment, the District Court of Appeal recognized the general rule as stated by defendant, but held that it did not apply to a cause of action arising from the repudiation of the partnership and conversion of its assets and profits, which cause of action was properly brought at law and not in equity, stating:

"Where, as in this case, some of the partners have excluded another and have appropriated the partnership property to their own use, the latter may treat the matter as a conversion and, without any accounting or disposition of the former partnership assets, sue the offending partners and recover against them a personal judgment in the amount of his damage."

Wilson v. Brown, 96 Cal. App. 140, 143.

That the allegations of the Complaint bring the present case within the aforementioned exception to the general rule is abundantly clear. Having alleged the repudiation and dissolution of the partnership, his exclusion therefrom, and Gunzburg's conversion of the partnership assets and profits, plaintiff was entitled to and did bring an action at law for his damages sustained thereby, for recovery whereof he prayed specifically. [R. 39.] In

such action and upon timely demand therefor, he was entitled to a jury trial.

Similarly, *in such an action at law*, plaintiff was and is entitled to receive his proper share of the profits of which he was thus deprived, and for which he prayed; and it is no bar to such relief in an action at law that an accounting might be required or prayed in order to determine the amount thereof. In *Zimmerman v. Harding*, 227 U. S. 489, 494-495, the United States Supreme Court expressly held that a partner who has been excluded from the partnership and deprived of the profits thereof by the acts of his copartner may maintain *an action at law* for his rightful share of the profits, stating:

“Neither is the remedy in equity for a breach of a partnership agreement exclusive. There may be at law a recovery of all the damages which result, including damages for profits prevented by a wrongful dissolution. Thus, if one member assumes to dissolve a partnership before the end of the term, the other may bring an action for damages for the breach, and recover not only his interest, but also his share of the profits which might have been made during the term. *He need not wait until the expiration of the period, and need not go into equity for an accounting, but may at law show the probable profits which he has been deprived of.*” (Emphasis added.)

To the same effect is the decision of the United States Supreme Court in *Karrick v. Hannaman*, 168 U. S. 328, 337.

The authorities cited by appellees at pages 23-25 of their Brief (the *only* authorities cited by them to this point) of course are in nowise in conflict therewith. Each of the cited cases involved an existing and continuing partnership, wherein the only matters at issue were the claims of the respective partners arising out of the con-

duct of the partnership enterprise; and none of these cases involved the termination or repudiation of the existence of the partnership by the defendant.¹

Alleging the wrongful dissolution of the partnership,² the repudiation of its existence and of his interest therein by Gunzburg, and the latter's conversion of the partnership assets and profits with the conspiratorial aid and connivance of the other defendants, plaintiff clearly and unmistakably pleaded himself within the scope of the foregoing authorities. He was entitled to, and did, allege all of these facts in an action at law to recover damages for wrongful dissolution *and* his share of past and future profits of which he was thus deprived. Upon these issues, plaintiff was entitled to the jury trial which he timely and properly demanded.

In addition to the legal remedies of damages and profits sought by plaintiff, he was entitled to and did pray, in the action at law, for a declaration of his rights arising from the wrongful dissolution and conversion alleged. [R. 34.] Contrary to appellees' unsupported assertion (Ap. Br. p. 21), that prayer does not convert the action into an equitable one. Where, as here, the rights and remedies in respect of which declaratory relief is sought are essentially legal in character, and can

¹In *Hadley v. Ellis*, 123 Cal. App. 2d 758, 761, 267 P. 2d 442, cited by appellees, the court expressly stated that "There are some exceptions to this general rule, but this case does not come within them."

²Although no term was specified in the agreement, the Complaint alleged the formation of the partnership for the exploitation and licensing of the three-dimension process. [R. 8-9.] It further alleged that the exploitation was continuing in the hands of the erring partner. [R. 25.] Under California law, the term of such a partnership is coextensive with the entire period of exploitation and licensing, and the prior termination thereof by less than all of the partners constitutes a wrongful and actionable dissolution. (*Owen v. Cohen*, 19 Cal. 2d 147, 150, 119 P. 2d 713; *Zeibak v. Nasser*, 12 Cal. 2d 13, 82 P. 2d 375; *Bates v. McTammany*, 10 Cal. 2d 697, 700, 76 P. 2d 513.)

be and—as in this case—are sought in an action at law, the issues in the declaratory relief action are legal and a jury trial will be accorded the litigants as a matter of right.

F. R. C. P., Rule 57;

Dickinson v. General Accident, etc. Corp. (9 Cir.),
147 F. 2d 396, 397;

Pac. Indemnity Co. v. McDonald (9 Cir.), 107
F. 2d 446, 448.

Since, in an action at law upon the facts alleged, plaintiff is entitled to seek recovery of his share of the partnership profits converted by defendants, he is not disabled from seeking such recovery at law merely because an accounting is necessary to determine the amount thereof. Where, as here, an accounting is necessary in an action at law to determine the amount of the recovery to which plaintiff is entitled, such an accounting may be included in the prayer for relief; and it does not convert the action into an action for equity, nor does the prayer therefor constitute a waiver of jury trial. (*Cases Cited*, Op. Br. pp. 27-31.)

Nor is the picture altered by the possible complexity of the required accounting. (Appellees made no effort below, in support of their motion or otherwise, to demonstrate that the accounting *would be* complex, rather than being merely sizeable.) Where, in an action at law, the required accounting may be complex or confusing, the *actual accounting* phase of the case may be taken from the jury and tried before the court or a master. This does not, however, justify or permit the refusal to submit to the jury the issues of money damages, breach and *right to an accounting*. On these issues, the litigants are entitled to a jury trial, regardless of the presumed complexity of the eventual accounting or the mode of trial thereof. (*Cases Cited*, Op. Br. pp. 29-31.)

II.

The Character of the Legal Issues Is Not Altered, nor Plaintiff's Right to Jury Trial Waived, by a Concurrent Prayer for Relief of an Equitable Nature in the Same Complaint.

As appellees have stated more than once in their Brief (pp. 23-31), plaintiff *did* in his Complaint seek *some* relief of an equitable nature, *in addition* to his claims for legal relief as aforesaid. Thus, *in addition to, but independent of*, his claims for money damages, declaratory relief and an accounting of profits, plaintiff sought dissolution of various corporate entities and distribution of their assets by way of judicial sale and division of proceeds, an injunction against disposition of partnership property, and the appointment of a receiver.³ [R. 36-39.]

These remedies are equitable in nature; and, insofar as the action seeks such remedies, the issues thereon are equitable. *But that fact does not convert into an action in equity that portion of the action which, independently, seeks legal relief in respect of legal issues.*

In essence, plaintiff's Complaint asserted claims to relief upon each of two theories: (1) in an action at law for damages and profits based upon the wrongful dissolution of the partnership and the conversion of its assets and profits; and (2) in an action in equity, for dissolution of the partnership and winding-up of the partnership affairs.

That these two alternative remedies are not inconsistent and may in fact be asserted in the same action has been conclusively determined by the United States Supreme Court in *Zimmerman v. Harding*, *supra*, 227 U. S.

³*In respect of the equitable relief sought*, plaintiff alleged the inadequacy of his legal remedy. [R. 34.] Such allegation has pertinence only to the equitable issues and does not have the effect of transforming the legal issues or of waiving plaintiff's right to jury trial thereon. (*Johnson v. Fid. & Cas. Co. of N. Y.* (8 Cir.), 238 F. 2d 322, 325.)

489. In that case, defendant had repudiated her partnership with plaintiff, excluded him from the management of the partnership business and converted to her own use the partnership profits. Plaintiff first brought an action at law against defendant for damages and profits; and then dismissed that action, bringing a second action in equity for dissolution and winding-up of the partnership. Upon appeal from an adverse judgment in the second action, defendant contended that the bringing of the first action constituted an election of remedies, precluding the bringing of the second action for the remedies allegedly rejected by the claimed election.

In affirming the judgment, the Supreme Court held that no election had occurred for the reason that the remedies are not inconsistent or mutually exclusive; that the wronged partner in such circumstances had both his remedy at law for damages and profits *and* his remedy in equity for judicial dissolution and winding-up of the partnership; and that the pursuit of one remedy did not preclude the concurrent pursuit of the other. (*Zimmerman v. Harding, supra*, 327 U. S. at 493-495.)

That is, of course, what plaintiff has done here. Pursuant to the provisions of Rule 18(a) of the Federal Rules of Civil Procedure, plaintiff joined in his Complaint his claims to legal and to equitable relief. As this Court has heretofore expressly held, and as appellees specifically recognize, “a joinder of a *legal claim for damages* with equitable claims did not deprive the plaintiff of a right to a jury trial on his legal claim.” (Ap. Br. p. 23.)

Bruckman v. Hollzer (9 Cir.), 152 F. 2d 730, 732-733;

Ring v. Spina (2 Cir.), 166 F. 2d 546, 550.

No significant effect can be given to the fact that plaintiff stated claims to legal and equitable relief in the same count of the Complaint, whereas in *Bruckman v. Hollzer*

such claims were separately stated.⁴ They may properly be stated in a single count, where no objection is made thereto, without waiver of jury trial upon the legal claims.

Leimer v. Woods (8 Cir.), 196 F. 2d 828, 833;

Russell v. Laurel Music Corp. (S. D. N. Y.), 104 Fed. Supp. 815, 816.

It does not assist appellees to label plaintiff's claims for damages, declaratory relief and profits as being merely "incidental" to his claims for equitable relief. The mere fact that both types of relief are sought does not transform either into a mere "incident" of the other. ". . . the prayer for equitable relief is no more controlling than the prayer for money damages in determining the essential nature of the complaint."

Ralph Blechman, Inc. v. Kleinert Rubber Co. (S. D. N. Y.), 98 Fed. Supp. 1005, 1006.

As we have observed, plaintiff's claim for legal relief arises directly from a set of facts alleged which would and do give rise to an action at law therefor, wholly without reference to the existence or assertion of any rights in equity. Such relief as is there sought is available independently of whether or not equitable relief is sought or recovered; and it is not (as in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, cited by appellees) available only as "a mere incident of a limited statutory equitable relief."

Bruckman v. Hollzer, supra, 152 F. 2d at 731.

Since the legal relief sought is recoverable in an action at law without necessity of resort to equitable jurisdiction, and would be so recoverable herein even if the Complaint had not *also* invoked the jurisdiction of equity, it follows

⁴Appellees did not seek, by motion or otherwise, to have such claims separately stated.

that it is not "incidental" to the equitable relief sought; and plaintiff is therefore entitled to a jury trial thereon.

Bruckman v. Hollzer, supra;

Cases Cited, Op. Br. pp. 20-21.

By the same token, plaintiff was entitled, in order that his right to jury trial should be "preserved . . . inviolate," to have the legal issues first determined by a jury, following which the equitable issues remaining and undecided should be determined by the court.

Leimer v. Woods, supra, 196 F. 2d at 834;

Bruckman v. Hollzer, supra, 152 F. 2d at 733.

III.

The Denial of Timely Demanded Jury Trial Being Error, That Error Was Demonstrably Prejudicial and Requires Reversal of the Judgment Below.

It is difficult for us to understand the legal basis upon which appellees assert that the judgment must be affirmed because the pending appeal does not have "those qualities which commend the sympathetic review of an appellate tribunal." (Ap. Br. p. 4.) It is apparently argued by appellees that, because the case was in fact tried and extensively briefed and involves no earth-shattering legal propositions, and because the findings of the court upon conflicting evidence are not clearly erroneous, a court trial is good enough; and that this case should not be reversed and remanded merely because plaintiff preferred and was erroneously denied a jury trial! Such an argument, we submit, places entirely too low a price upon rights secured by the United States Constitution.⁵

⁵The absurdity of this half-articulated argument is best demonstrated by the fact that its acceptance would convert a constitutionally protected right into one which, for all practical purposes, may be granted or withheld at the discretion of the trial court. Appellee's argument would leave an aggrieved litigant without appellate remedy for the erroneous denial of a jury trial. The order of the trial court is not appealable, apart from appeal from a final judgment in the cause. (*Zamore v. Goldblatt* (2 Cir.), 201 F. 2d 738;

Actually, the question on this appeal is not whether the trial court fairly conducted the trial, nor whether a jury, given the opportunity, might have reached the same result, nor whether the findings below are clearly erroneous. The sole question is whether plaintiff was entitled to a jury trial. If he was, and if the evidence would have sustained a judgment in his favor, then the denial of a jury trial was necessarily prejudicial, and plaintiff is entitled to a reversal of the judgment and remand for trial in the mode chosen by him, regardless of the length or essential fairness of the trial below.

The applicable authorities universally so hold:

Jacob v. City of New York, 315 U. S. 752-753;

Dickinson v. General Accident etc. Corp. (9 Cir.),
147 F. 2d 396, 397;

Leimer v. Woods (8 Cir.), 196 F. 2d 828, 833-
834, 836-837;

Bowie v. Sorrell (4 Cir.), 209 F. 2d 49, 51;

Barber v. Turbeville (C. A. D. C.), 218 F. 2d
34, 37.

A. Plaintiff's Evidence Was Clearly Sufficient to Sustain a Verdict in His Favor and to Prevent the Direction of a Verdict in Favor of Appellees.

In an attempt to insulate the judgment below from reversal, notwithstanding the error in striking plaintiff's demand for jury trial, appellees blandly assert that the evidence was such as to have required the direction of a

In re Chappell & Co. (1 Cir.), 201 F. 2d 343, 344.) The propriety of review by prerogative writ under Section 1651 of the Judicial Code is at best subject to grave doubt. (*In re Chappell & Co.*, *supra*; *Petsel v. Riley* (8 Cir.), 192 F. 2d 954, 955.) The only review available to the litigant seeking a jury trial is upon appeal from an adverse judgment after a non-jury trial on the merits. (*In re Previn* (1 Cir.), 204 F. 2d 417, 418-419.) If, however, as appellees suggest, even the erroneous order of the trial court will be sustained if the non-jury trial to which plaintiff was forced was fairly conducted and the findings sustained by conflicting and disputed evidence, the constitutional guaranty is wholly ineffectual against error below. Such a procedure does not "preserve inviolate" the right of trial by jury.

verdict in their favor. (Ap. Br. pp. 32-38.) To support this assertion, they resort to an argumentative review of all of the evidence most favorable to them; most of that evidence being directly contradicted by the evidence offered by plaintiff, by the documents prepared and signed by the parties, and by the surrounding circumstances.

In this summary, appellees wholly ignore the testimony of plaintiff to the making of the agreement with Gunzburg [R. 137-202]; the plethora of correspondence between the parties and the press releases prepared by Gunzburg eloquently proclaiming the existence of the agreement upon which plaintiff sued [see, *e. g.*, Exs. A-E, 1-43]; and the testimony of not less than *twelve* independent and disinterested witnesses [R. 614-617, 639-650, 681-686, 732-743, 763-784, 789, 794, 797, 798, 812-818, 832-833, 981-984, 1013-1018, 1041-1050, 1077-1089, 1137-1145, 1775-1777] to statements and admissions by defendant Gunzburg, which were either direct acknowledgements of the existence of the partnership or wholly inconsistent with the hypothesis of its non-existence.⁶ The most pertinent elements of that evidence have been heretofore summarized by us. (Op. Br. pp. 10-12, 14-16, 36-37.)

Appellees also wholly ignore the legal principle which governs consideration of their argument that a direction of a verdict in their favor would have been proper, as that principle has been recently stated by the United States Supreme Court:

“It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the

⁶Within available space limitations, we cannot review all of the evidence and the inferences therefrom which would not only support a verdict for plaintiff but, we submit, make the rendition

case of a litigant against whom a peremptory instruction has been given.”

Wilkerson v. McCarthy, 336 U. S. 53, 57;

Kyle v. Swift & Co. (4 Cir.), 229 F. 2d 887, 889;

Milprint, Inc. v. Donaldson Chocolate Co. (5 Cir.), 222 F. 2d 898, 901-902.

So judged, the evidence herein would unquestionably have precluded the direction of a verdict for appellees. Plaintiff's testimony and that of twelve disinterested witnesses, if believed, was amply sufficient to sustain the allegations of the Complaint; and plaintiff was entitled to have the credibility of that testimony assessed by a jury and not by the trial judge in the direction of a verdict. The purposeful summary by appellees of the evidence deemed most favorable to them *might* have convinced a jury of the merit of their defense, but it does not even remotely establish that defense conclusively and as a matter of law.⁷ It follows, then, that the denial of a jury trial was prejudicially erroneous. (*Cases Cited*, Op. Br. pp. 37-38.)

B. The Issue of Unclean Hands Was, by Direction of the Trial Court and Agreement of the Parties, Expressly Deferred and All of Plaintiff's Evidence Thereon Withheld, Pending Determination of the Existence of the Agreement Sued Upon. In Its Decision, for This Reason, the Trial Court Expressly Declined to Pass Upon That Issue. Upon That Record, the Defense of Unclean Hands Has No Pertinence to This Appeal.

We recognize that the enthusiasm of the appellate advocate may often turn fair argument into innocent mis-

thereof almost a compelled conclusion. The attention of the Court is respectfully invited to plaintiff's summation herein [R. 1786-1811], which, we believe, clearly demonstrates the probative force of plaintiff's case.

⁷The remarks of the trial judge in rendering judgment for appellees clearly indicate that his determination resulted from a resolution of conflicting evidence upon the preponderance of that evidence, and not as a matter of law. [R. 1812-1813]. See also, *Johnson v. Fid. & Cas. Co. of N. Y.* (8 Cir.), 238 F. 2d 322, 326.

statement; and that the line between such innocent misstatement and deliberate misrepresentation of the record is not always an easy one to draw. We would like to believe that appellees have been guilty only of the former, and not of the latter, in their argument that the judgment must be affirmed because plaintiff came into court with “unclean hands”, apparently as a matter of law. (Ap. Br. pp. 39-45.)

Wholly apart from the lack of factual foundation for that charge, this is the clear and undeniable state of the record below upon the issue of “unclean hands”:

1. The issue was tendered as an affirmative defense by appellees. [R. 70.] Their view of the facts upon which that defense rested was also asserted by them in a counterclaim for money damages. [R. 74-81.] To that counterclaim, plaintiff answered, denying each of the pertinent factual allegations, and affirmatively alleging the true facts, upon proof of which it would be clear that plaintiff was guilty of no wrongful or actionable conduct. [R. 90-98.]

2. Upon cross-examination of plaintiff, appellees’ counsel announced an intention to go into the subject of unclean hands. After only a few questions had been asked, the court announced that it would hear no evidence at that time upon the subject, but would *later* pursue the subject if it became relevant, and directed appellees’ counsel to make *an offer of proof*. [R. 434.]

3. Appellee’s counsel then made *an offer of proof*, of matters not then or thereafter in evidence, all of the elements thereof being denied by plaintiff. [R. 442-447.] Following the completion of the offer of proof, the trial court stated that it would not consider evidence on the issue unless it should subsequently determine the existence of a partnership between the parties, making a ruling upon that issue necessary; in which event it would “reopen the case for additional evidence” thereon. [R. 447.]

4. Subsequently, in reply to query by plaintiff’s coun-

sel as to whether the issue of unclean hands was then before the court, the court instructed Mr. Selvin (plaintiff's counsel) that it would not hear evidence thereon. [R. 511-515.] In fact, the trial court stated:

"I want to say this, that I have no intention of making any findings on unclean hands one way or the other until after I have disposed of the question of whether or not there was this alleged agreement."
[R. 513.]

In view of this unequivocal ruling by the court, Mr. Selvin refrained from offering plaintiff's evidence upon the issue, *and specifically informed the court and appellees' counsel that he was so refraining.* [R. 527.] The trial court subsequently repeated and reemphasized its exclusionary ruling. [R. 600-601.]

5. That appellees also understood that the issue was not to be tried at that time clearly appears from the statement of their counsel, acknowledging that plaintiff had not presented evidence upon that issue in the light of the trial court's ruling, and that *neither party* would "at this time go into the matter of unclean hands." [R. 1088-1089.]

6. The trial court did not reopen the case for the consideration of evidence upon unclean hands and in its Memorandum Opinion stated that "I am making no ruling on the defense of unclean hands raised by defendants and shall make no finding thereon." [R. 100.] In its Findings of Fact and in its Final Judgment, the trial court again recited that "*No evidence was received by the court*" with respect to that issue, inasmuch as "it was unnecessary to consider or rule" thereon. [R. 101, 110. (Emphasis added.)]

The state of the record set forth above shows beyond contradiction, *and beyond possibility of mistake or misapprehension*, that the trial court had ruled out of its consideration any evidence on unclean hands; and that, in express compliance with the court's ruling, plaintiff

had not offered evidence to show the true facts with reference thereto, which facts would have shown the defense to be without merit. To assert in the light of these facts, as appellees do assert, that the testimony on the subject “stands uncontradicted on the record” and that plaintiff has “made no effort to explain it away or “to justify it in his appeal” (Ap. Br. p. 44), is little short of outrageous! Candor and fairness require of appellees greater respect than their argument exhibits.

That a record so incomplete upon the issue cannot be considered by this Court for the purpose of ruling thereon as a matter of law hardly requires demonstration.⁸

Whether or not unclean hands exist in respect of certain conduct is a *question of fact* for resolution in the first instance by the trier of fact. Consideration of a defense premised thereon can and will be given only when *the facts* pertinent to that defense *are properly before the court*.

Moss Estate Co. v. Adler, 41 Cal. 2d 581, 584,
261 P. 2d 732;

Stone v. Lobsien, 112 Cal. App. 2d 750, 757-758,
247 P. 2d 357.

That situation does not exist here. In the first place, an offer of proof, an unoffered deposition, and inadmissible hearsay to which timely objection was made (which admittedly constitute the “evidence” upon the issue in the record) do not constitute “facts properly before the court.” Secondly, the trial court expressly excluded most of the evidence on the subject, including *all* of plaintiff’s evidence thereon, for the reason that it

⁸In view of these facts, it is neither appropriate nor useful to argue in this Reply Brief the effect and meaning of evidence which was not offered, upon an issue which was not tried. To indicate in brief fashion, however, the true facts upon this issue which we were and are prepared to prove, we have appended hereto an analysis of appellees’ claims and of the actual facts, as an appendix to this Brief.

was not going to rule on the issue. Certainly, this court will not rule as a matter of law upon an issue as to which the trial court declined to rule because it had not heard the evidence thereon. And, finally, the trial court specifically declined to make any finding upon the issue, excluding it from the issues adjudicated. If the refusal to make a finding thereon was error (and we submit in the light of the record that it was not), appellees have filed no appeal herein and they are consequently precluded from asserting that such refusal was erroneous and from going beyond the ground of decision below.

Peoria & P. U. Ry. Co. v. United States, 263 U. S. 528, 536;

Stepp v. McAdam (9 Cir.), 88 F. 2d 925, 927.

Moreover, the "evidence" which appellees conceive to support their defense consists in no pertinent respect of competent evidence contained in the record upon this appeal. (See Appendix, *infra*.) It follows, then, that the dubious merit of the defense is not now available to appellees or properly before this court.

Dictograph Products Co. v. Sonotone Corp. (2 Cir.), 231 F. 2d 867;

United States v. Ashe (3 Cir.), 176 F. 2d 606, 607.

Conclusion.

Even viewed only as an action between partners, plaintiff's Complaint herein alleged the formation of a partnership for a specific purpose, the wrongful dissolution of the partnership by defendant Gunzburg before the expiration of its term, the repudiation by Gunzburg of the partnership and of plaintiff's interest therein, and the conversion and appropriation by Gunzburg with the conspiracy and connivance of the other defendants of all of the assets and profits of the partnership. Upon these facts, plaintiff had available to him two concurrent and complementary remedies: an action at law for wrongful dissolution and for damages and an accounting of profits

of which he was thus deprived; and an action in equity for a judicial winding-up of the partnership and distribution of its assets and properties. It was the clear purpose of Rule 18(a) of the Federal Rules of Civil Procedure to make both of these remedies available to plaintiff in a single action. Such joinder of claims to relief did not deprive plaintiff of his Constitutional right to a jury trial upon the legal claims asserted. Nor is the legal relief sought in any respect "incidental" to the equitable relief, since such legal relief can be asserted, proved and resolved independently of the equitable claims and is in nowise dependent upon the attachment of equity jurisdiction.

Having asserted his rights in the manner and at the time provided in the Rules by which this action is governed, plaintiff was entitled, as a matter of Constitutional right, to a trial of the issues in the mode chosen by him. Plaintiff's evidence was amply sufficient to have sustained a jury verdict in his favor; and he is not now precluded from relief by appellees' assertion of a defense which was not litigated or determined below, and which, had it been so litigated, must have resulted in its resolution in favor of plaintiff.

It follows that the error below in striking plaintiff's demand for jury trial and in proceeding to trial without a jury was indisputably prejudicial to rights guaranteed plaintiff by the United States Constitution; and that the judgment below must be reversed and the cause remanded for retrial of the legal issues by a jury; subsequently to or concurrently with which the court may determine the equitable issues.

Respectfully submitted,

HARRY L. GERSHON,

Attorney for Appellant.

FITELSON & MAYERS,

Of Counsel.





APPENDIX.

The Evidence on the Defense of Unclean Hands.

As we pointed out in the body of our Reply Brief (Point III, B, *supra*), the record before this Court contains only a very small part of the total evidence in respect of the defense of unclean hands. The record contains *none* of the evidence which would have been offered by plaintiff to demonstrate conclusively that the defense is wholly without merit, such evidence having been withheld at the direction of the trial court.

In normal circumstances, we would never attempt to discuss or argue evidence before this Court which cannot be found in the record before it. Appellees, however, have taken advantage of the incomplete state of the record to toss about with profligate abandon unsupported characterizations of the evidence as “uncontradicted” and “indisputable”, and have made reference to such evidence as *is* in the record in manners which the record flatly contradicts. This hyperbolic recital is tendered by appellees to the Court with their solemn assurance that it is all true and not subject to any possible dispute.

We cannot permit these extravagant assertions to go unchallenged and uncorrected.

We shall, accordingly, indicate in this Appendix the true nature of the evidence *in* the record which appellees have erroneously and unfairly purported to state; and shall also indicate, in summary fashion, the true facts as we would have shown them to exist at the trial and as we shall show them to exist upon retrial. In this latter respect, we should not be understood as relating evidence which is properly before this court, or as claiming that such evidence should be considered by it; but that we do so solely for the purpose of showing the gross inaccuracy

of appellees' claims that the "evidence" which they relate is conclusive and beyond dispute:

1. Appellees appear to detect a heinous quality in certain discussions plaintiff allegedly had with Arch Oboler concerning the manufacture of viewers allegedly "in competition" with those marketed by plaintiff and Gunzburg. (Ap. Br. p. 42.) They neglect to inform the court that these "negotiations" were not conducted without Gunzburg's knowledge, but *were* conducted by plaintiff *with Gunzburg's express authorization and approval*, and that plaintiff thereafter voluntarily abandoned the transaction before anything was done, because of its possibly competitive aspects! [R. 594-600.]

2. Much is made by appellees of "evidence" that, at a "secret" meeting with the officials of Polaroid Corporation, plaintiff allegedly advised these officials "whom they should turn to in place of Gunzburg." (Ap. Br. p. 42.) In the course of this one-sided recital, appellees apparently found it quite unnecessary to inform the court of the following *facts* concerning that matter:

a. The meeting was not "secret," nor was it arranged by plaintiff. It was initiated and requested by the Polaroid officials. [R. 741.]

b. The meeting was held *after* Gunzburg had repudiated his agreement with plaintiff and refused to recognize plaintiff's interest in the venture. [R. 453-454, 458, 741.]

c. Prior to that meeting, Polaroid had determined irrevocably that, because of Gunzburg's intransigence and the unpleasant relations caused by Gunzburg's unreasonable conduct, it would not renew the contract; had so informed Gunzburg; and had informed him that the decision not to renew was irrevocable.

[R. 737-741, 779-783.] Gunzburg had so informed plaintiff. [R. 455-456.]

d. *At the meeting, plaintiff made a very vigorous and determined "pitch" to persuade Polaroid to revoke its previous decision and to renew the contract. It was only after he was informed that there was not the slightest chance of renewal that he discussed alternatives with the Polaroid officials.* [R. 454, 457-458, 741-742.]

e. Nothing that plaintiff said or did in any manner or respect led to or resulted in Polaroid's decision not to renew the contract. [R. 743, 784.]

3. Appellees appear to find comfort in a claim that plaintiff, while engaged in efforts to *sell* a motion picture in which he and Gunzburg had the right to receive 20% of the profits, "negotiated secretly to join with United Artists *in buying* the picture." (Ap. Br. pp. 42-43.) (For unexplained reasons best known to appellees, the reference to the record claimed to support this charge is found tucked away in a footnote in their Brief.)

When the record reference in question is examined (as appellees apparently hoped it would *not* be examined), it will be observed that the "evidence" allegedly supporting this charge consists only of a hearsay memorandum, *written by a man named Robert Benjamin to a man named Arthur Krim*, which memorandum was never shown and the contents thereof never communicated to any party to this action! [R. 670-673.] Neither the writer nor the recipient of the memorandum was or is a party or privy to this action, and to this date we are wholly unenlightened as to any possible theory upon which appellees claim or purport to believe that such a

memorandum is admissible in evidence against plaintiff. To the introduction of this document timely and proper objection was made.¹ [R. 671-672.]

The document relied upon was not introduced at the deposition of Benjamin, its author, nor at that of Krim, its recipient, but was introduced at the deposition of one *Seymour Peyser*. Although appellees had originally noticed the deposition of Benjamin, their counsel announced at the close of the Peyser deposition that he did not intend to take the Benjamin deposition, whereupon plaintiff's counsel proceeded to take that deposition. [R. 703-704.]

Benjamin, the author of the document from which appellees profess to deduce such startling inferences, then testified that the document was essentially jocular, that plaintiff had sought to induce United Artists to purchase the picture, and that as evidence of his belief that what he was offering to United Artists was a "good deal" for the buyer as well as for the sellers he represented, plaintiff suggested that he would be willing to invest with United Artists in the purchase, *provided that the parties (including Gunsburg) upon whose behalf he was selling the picture would consent and permit him to participate in the purchase.* [R. 706-708.]

4. The major element of appellees' unclean hands defense appears to be an abortive and unsuccessful attempt by plaintiff to sell to one Alperson the motion picture eventually sold to United Artists. With candor not

¹Significantly, when, at the taking of the deposition at which the document was produced, objection was made to the document, appellees' counsel not only followed the usual procedure of attaching the document to the deposition as an exhibit, but also took the very unorthodox step, for purposes at which we can only guess, of reading that document into the body of the deposition!

elsewhere displayed in their argument, appellees tacitly concede that the record is totally devoid of *evidence* relating to this transaction, the trial court having then announced its willingness to hear or consider evidence relating to unclean hands.

Appellees accordingly have asked this Court to rule upon the defense of unclean hands on “facts” contained *only* in an unsworn *offer of proof* made by appellees’ counsel. [Ap. Br. p. 43; R. 423-447.] An offer of proof, of course, is not evidence, and cannot support affirmance of a judgment by an appellate court.

Lyon v. Davis, 111 Ind. 384, 12 N. E. 714;

Harris v. Tomlinson, 130 Ind. 426, 30 N. E. 214.

Nor can this court consider as “evidence” appellees’ characteristically extravagant summary of “appellant’s own testimony” *in a deposition which was never offered or read in evidence and which is not part of the record on this appeal*. Such a deposition cannot be considered for any purpose by an appellate court.

Dictograph Products Co. v. Sonotone Corp. (2 Cir.), 231 F. 2d 867;

United States v. City of Brookhaven (5 Cir.), 134 F. 2d 442, 446-447.

Of course, the *true facts* relating to this transaction, which we were and are prepared to prove at such time as proof thereof becomes relevant, bear little relation to the “facts” appellees claim that they can prove, and demonstrate conclusively that plaintiff was guilty of no wrongdoing. In the interests of saving space by *not* arguing matters which are not in the record, we respectfully refer this Court to the allegations of plaintiff’s Answer to defendants’ First Counterclaim, relating to the Alperson transaction. [R. 90-97.] We respectfully and

in good faith represent to this Court that we could and can prove, and were prepared to prove to the trial court had it not declined to hear evidence on the subject, each and all of the facts therein alleged.

That proof would have shown that plaintiff did not seek to make a secret profit upon the sale, but instead indicated that he would forego his sales commission as a personal investment, to induce Alperson to make the purchase upon terms more favorable to plaintiff's principals than plaintiff or his principals had been able to obtain elsewhere;² that plaintiff would not have gone through with his participation in the transaction unless and until, upon a full disclosure of the facts, everyone (including Gunzburg) consented and approved that participation; and that it was *plaintiff* who recommended against the acceptance of the Alperson offer because, upon further consideration, he had concluded that its acceptance would not be to the benefit of the *sellers*.

It follows, then, that upon such proof no factual foundation exists for application of the doctrine of unclean hands to the decision of the case at bar.

²We do not overlook appellees' gross misrepresentation that others wanted to purchase the motion picture "at a much higher figure" than \$2,000,000.00. (App. Br. p. 43.) (Appellees strangely neglect to inform this Court that their impressive list of record references allegedly supporting this assertion do not refer to any competent evidence thereof but only to what their counsel stated he thought he could prove if the trial court would permit him—which it did not.) Actually, there were no *offers* made by any purchasers, other than Alperson and (much later) United Artists, *at any price*. Far from having people who "wanted to purchase the picture" at fabulous prices, the sellers had been striving desperately to solicit buyers therefor, and had gotten *no* offers!

No. 15210

**United States
Court of Appeals**
for the Ninth Circuit

RENNIE & LAUGHLIN, INC., a Corporation,
Appellant.

vs.

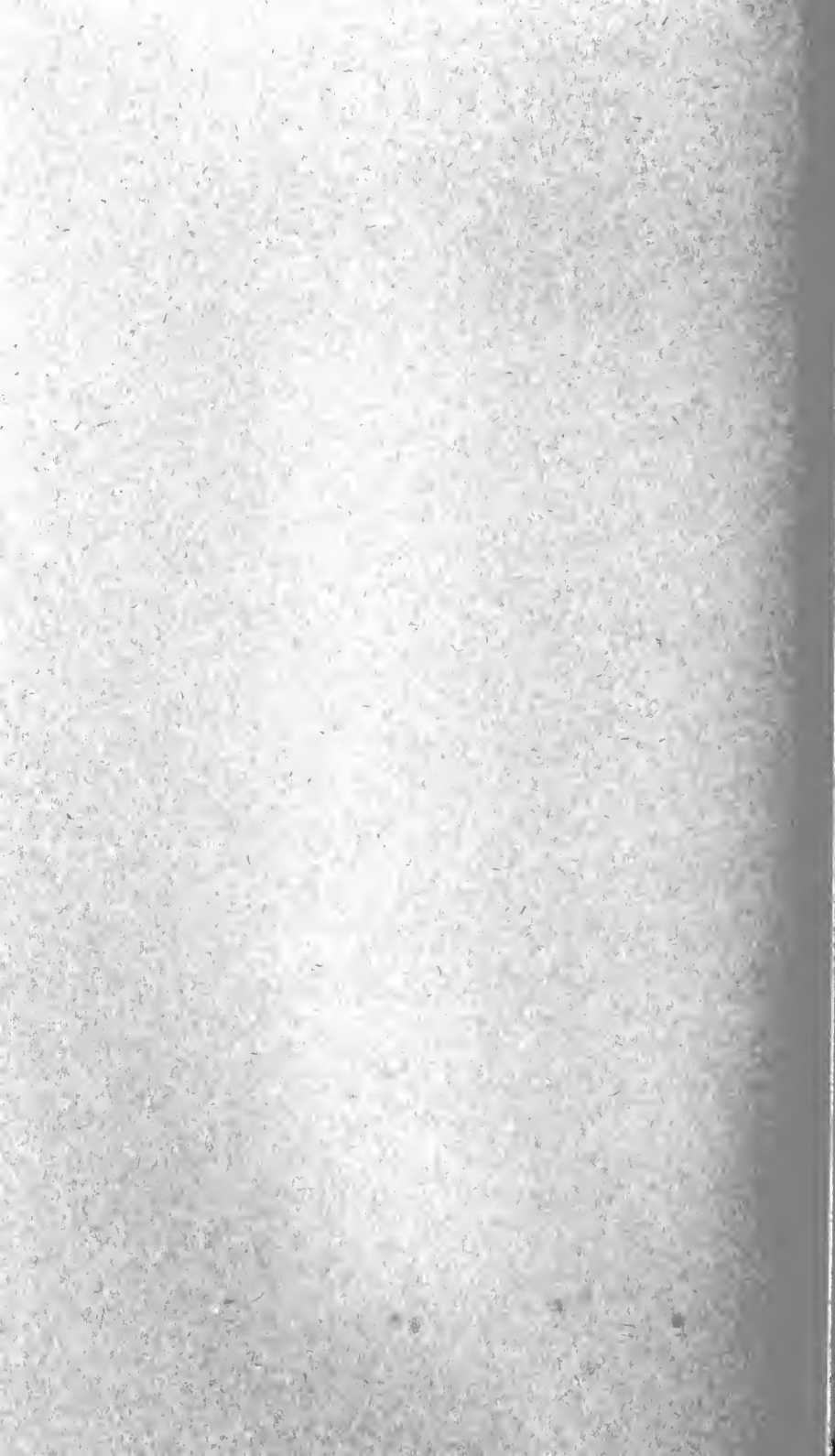
CHRYSLER CORPORATION,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

OCT 22 1956

PAUL D. O'BRIEN, CLERK



No. 15210

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, Southern District of
California, Central Division

No. 18518-C

RENNIE & LAUGHLIN, INC., a California Corporation,

Plaintiff,

vs.

CHRYSLER CORPORATION, a Delaware Corporation,

Defendant.

COMPLAINT

(Breach of Contract)

Comes Now the Plaintiff and for cause of action against the defendant, complains and alleges, as follows:

I.

That at all times herein mentioned plaintiff was and now is a corporation duly organized under the laws of the State of California.

II.

That at all times herein mentioned defendant was and now is a corporation duly organized under and by virtue of the laws of the State of Delaware.

III.

That on or about the 12th day of December, 1949, Plaintiff and Defendant entered into a certain contract in writing in the State of Michigan, a copy of

which is attached hereto as Exhibit A, and made a part hereof.

IV.

That by reason of said contract herein annexed as Exhibit A, Plaintiff was made a direct dealer by Defendant, with a non-exclusive right to purchase DeSoto and Plymouth motor vehicles and parts and accessories thereof for re-sale in the vicinity of Los Angeles, California, under the terms and conditions as are more fully set forth under said contract.

V.

That from the date of said contract, annexed hereto as Exhibit A, to wit, December 12, 1949, Plaintiff operated as a DeSoto and Plymouth Dealer in the vicinity of Los Angeles continuously through the period covered by this complaint.

VI.

That on or about the 20th day of February, 1952, Plaintiff and Defendant entered into a certain contract in writing in the State of Michigan, a copy of which is attached hereto as Exhibit B, and made a part hereof, under the terms of which Plaintiff continued to represent Defendant as a DeSoto and Plymouth Dealer in the vicinity of Los Angeles, California.

VII.

During the period commencing in the month of April, 1951, Plaintiff sustained an operating loss in its business as a direct Dealer for Defendant, which operating loss continued during the subse-

quent months of 1951; and in the month of July, 1951, President of Plaintiff corporation, and the active manager of Plaintiff's business, J. C. Rennie, sustained a heart attack which resulted in his hospitalization during July, and prevented the said J. C. Rennie from being able to devote his time and efforts to Plaintiff corporation.

VIII.

Due to the aforesaid losses being sustained by Plaintiff and the ill health of President of Plaintiff corporation as aforesaid, Plaintiff advised Defendant corporation in September, 1951, that Plaintiff corporation desired to sell its business to a prospective buyer. Defendant corporation through its authorized agents, advised Plaintiff corporation that they would secure a buyer for Plaintiff corporation who was not only financially able to purchase said business but one who would be acceptable to Defendant corporation.

IX.

On or about the 1st day of October, 1951, Plaintiff corporation commenced negotiations with one Darwin C. McCredie and one George Peck for the purchase of Plaintiff's business, said buyers having been referred to Plaintiff corporation by the agents of Defendant corporation.

X.

Thereafter, with the full knowledge and consent of Defendant, negotiations were had with said prospective purchasers which resulted in a final sale

being made of Plaintiff's business to said prospective buyers on October 26, 1951; and by the terms of said agreement of sale said prospective buyers agreed to pay Plaintiff corporation Seventy-Seven Thousand, Nine Hundred Twenty-One and 69/100 (\$77,921.69) Dollars, and in addition thereto said prospective purchasers agreed to assume the lease under which Plaintiff corporation was operating its business and assume all business and corporate expenses after the date of said sale; and it was further agreed, on said date, that the formal contract of sale would be made on the 27th day of October, 1951, and the purchase price paid at that time.

XI.

On or about the 27th day of October, 1951, prior to the completion of said sale, Defendant corporation advised Plaintiff corporation that they would not consent to said sale of the business to said prospective buyers or would not consent to the sale of the business to any other purchaser.

XII.

That said refusal of Defendant corporation to permit and allow Plaintiff to sell said business to said purchasers constituted a breach of said sales contract annexed hereto as Exhibit A.

XIII.

That by reason of the failure and refusal of Defendant to consent to said sale of said business it **was necessary that Plaintiff corporation enter into**

a management contract with said prospective purchasers wherein and whereby Plaintiff turned over to said purchasers its entire business on a management basis.

XIV.

Thereafter, by reason of continued losses during said management period, said business was closed by Plaintiff corporation and Plaintiff discontinued operating as a direct dealer for Defendant.

XV.

That at all times herein mentioned Plaintiff fully performed all things required of Plaintiff by the terms of said contract, Exhibit A attached hereto.

XVI.

That by reason of the breach of said contract by Defendant by refusing to approve the sale of said business by Plaintiff as aforesaid, Plaintiff was not paid and received no part of said sale price for said business, to wit, the sum of Seventy-Seven Thousand Nine Hundred Twenty-One and 69/100 (\$77, 921.69) Dollars, all to Plaintiff damage in said sum.

XVII.

As a further proximate result of said Defendant's breach of said contract, Plaintiff corporation, in the operation of its business from the date of the refusal of Defendants to allow the sale of said business, to wit, the 27th day of October, 1951, to the date said business was finally terminated and closed, to wit, on the 31st day of March, 1954, Plaintiff corporation sustained losses in the amount of One

Hundred Two Thousand, Six Hundred Eighty-Six and 64/100 (\$102,686.64) Dollars, all to Plaintiff's further damage in said sum.

XVIII.

Plaintiff, by reason of the acts of Defendant in refusing to permit the sale of said business of Plaintiff as aforesaid, and as a proximate result thereof, sustained damage to Plaintiff's reputation as an automobile dealer in the vicinity of Los Angeles, California, which damage was irreparable, all to Plaintiff's further damage in the sum of Three Hundred Thousand and no/100 (\$300,000.00) Dollars.

XIX.

That the acts of Defendant as aforesaid in refusing to permit said sale and transfer all Plaintiff's business were without cause and arbitrary.

Wherefore, Plaintiff prays for judgment against the Defendant as follows:

1. The sum of Seventy-Seven Thousand, Nine Hundred Twenty-One and 69/100 (\$77,921.69) Dollars, by reason of the loss of the sale of Plaintiff corporation;

2. The sum of Seventy-Seven Thousand, Nine Hundred Twenty-One and 69/100 (\$77,921.69) Dollars, by reason of the breach of said contract by said Defendant;

3. The sum of One Hundred Two Thousand, Six Hundred Eighty-Six and 64/100 (\$102,686.64) Dol-

lars, by reason of Plaintiff's further damage as the result of sustained losses;

4. The sum of Three Hundred Thousand (\$300,000.00) Dollars, by reason of sustained damage to Plaintiff's reputation as an automobile dealer;

5. For costs of suit incurred herein; and,

6. For such other and further relief as to the Court seems meet and proper in the premises.

SPRAY GOULD & BOWERS,

By /s/ CHARLES P. GOULD,
Attorney for Plaintiff.

EXHIBIT A

No. 527

California Zoned

Duplicate for Direct Dealer

Agreement

Between

De Soto Direct Dealer

and

Chrysler Corporation

De Soto Division

This Agreement is made by and between Rennie & Laughlin, Inc., a Corporation, hereinafter called Direct Dealer, and Chrysler Corporation, a Delaware corporation, for its De Soto Division, hereinafter called De Soto.

Purposes of this Agreement

The success of Direct Dealer and of De Soto are both dependant upon a continuing good will on the part of the public toward De Soto and Plymouth products and policies. Both Direct Dealer and De Soto recognize and assume in this agreement certain responsibilities to each other and to the public. The success of each direct dealer is either promoted or hindered by the business conduct of all other direct dealers, and particularly by other direct dealers in his immediate vicinity. Direct Dealer recognizes and assumes in this agreement that his adherence to the terms thereof, and the adherence thereto by all other direct dealers, is a matter of mutual importance and consequence to himself, to all other direct dealers and to De Soto. The mutual effort of all concerned is directed to providing the consuming public with products of improved design, produced under conditions conducive to efficiency and high quality, and sold in accordance with fair policies and practices, in the belief and confidence that in so doing the most stable and profitable business for both Direct Dealer and De Soto will be built and maintained.

The purpose of this agreement is to set forth in a clear and understandable way the terms and conditions under which De Soto and Direct Dealer agree to do business together and thus to facilitate Direct Dealer's purchases and resale of De Soto and Plymouth products.

De Soto recognizes a sound dealer organization as essential to its own success. Under this agreement it is De Soto's aim not only to provide Direct Dealer with good merchandise for resale, but also to have a fair, mutually helpful and friendly business association exist between Direct Dealer and De Soto.

The sale of motor vehicles requires merchandising methods particularly adapted to this business. De Soto depends upon dealers for more than the sale of its products to the public. The public charges De Soto with a responsibility for De Soto and Plymouth products long after the dealer sells them. The public expects De Soto for years to come to make available for convenient purchase necessary replacement parts, to encourage the maintenance of adequate supplies of these parts throughout the country and to see to it that service stations manned with competent mechanics are readily available.

De Soto through the expenditure of money and effort promotes and facilitates in many ways the sale and servicing of De Soto and Plymouth products; through advertising, publicity and other activities it contributes substantially to a favorable public attitude toward De Soto and Plymouth products and policies. This established good will constitutes an inherent element of value to Direct Dealer under this agreement. Direct Dealer invests his capital, applies his efforts and experience, and identifies his reputation as a merchant and a business man with the sale and servicing of De Soto and Plymouth products under this agreement. The re-

sult is that Direct Dealer and De Soto have a common interest in the public good will toward De Soto and Plymouth products, toward the dealer and toward De Soto. Under these circumstances understanding and cooperation between Direct Dealer and De Soto are essential to both.

This agreement under which Direct Dealer and De Soto operate recognizes these principles as being necessary to insure business success. It is recognized that of the many factors which determine an individual direct dealer's success there are many which are beyond the control or responsibility of De Soto or its ability to make his operation successful; and De Soto is not in a position to assume such responsibility. Under this agreement Direct Dealer receives important advantages and privileges. He assumes responsibility to develop actively and diligently the sales and servicing of De Soto and Plymouth products in the sales area allotted to him, and De Soto endeavors to cooperate with him in so doing, but in the event of his failure or inability to develop his sales area, Direct Dealer recognizes that it is proper for De Soto to take such measures as may in De Soto's opinion be necessary to cause the sales possibilities of the area to be realized, and the service responsibilities to be performed.

The terms of the agreement are the result of many years of experience and study by De Soto as well as of suggestions by dealers themselves. Essentially the arrangements between De Soto and Direct Dealer seek to make it easier for Direct Dealer to

buy motor vehicles and parts and accesories from De Soto and easier for the public to buy motor vehicles and parts and accessories from Direct Dealer.

In order to promote this result, De Soto endeavors to provide Direct Dealer with products of a quality that will render good service to the user under fair and reasonable terms and to cooperate with Direct Dealer in effectively merchandising its products to the public. Direct Dealer will endeavor to the best of his ability and resources to sell such products in the sales area allotted to Direct Dealer and under conditions which experience indicates are necessary for successful motor vehicle sales development.

The success of these endeavors, among other things, requires:

A. A suitable place of business established by Direct Dealer for the proper representation of De Soto and Plymouth products, including appropriate stocks of new motor vehicles, parts, and accessories, salesroom, parts department and service station, with appropriate organization and equipment, all in keeping with policies which De Soto together with its direct dealers' experience has found to be necessary for successful dealer operations.

B. Active promotion and development of the sale of De Soto and Plymouth products on the part of Direct Dealer in his sales area; prompt, efficient and courteous service to customers in conformance with service policies recommended by De Soto, including the carrying out of the provisions of the

Owner's Service Policy which is necessary to promote owner good will, and the display and maintenance of De Soto and Plymouth sales and service signs.

C. Appointment by Direct Dealer of associate dealers acceptable to De Soto at such points in his sales area as may be designated by De Soto in order to develop the market for motor vehicles and parts in that sales area, and responsibility on the part of Direct Dealer for their proper functioning along sales and service lines.

The terms of this agreement relate to the foregoing principles and policies and are intended to operate in practice to the mutual benefit of Direct Dealer and De Soto and the consumer.

The parties, therefore, agree as follows:

- 1.

Selling

Within the bounds of the sales area allotted to Direct Dealer, Direct Dealer agrees to sell energetically the vehicles, parts and accessories he buys from De Soto and to provide and maintain facilities for selling and servicing them which are adequate to serve properly the public in the sales area.

Direct Dealer also agrees to use his best efforts to procure, appoint and maintain at such points in his sales area as De Soto shall designate from time to time, and at no other points, associate dealers ac-

ceptable to De Soto and able in the opinion of De Soto to qualify with sufficient capital, finance facilities, stocks of vehicles, parts and accessories, proper signs, showrooms, and service facilities together with adequate organization, all on a standard appropriate in the opinion of De Soto to develop the market available at the points for which Direct Dealer appoints them.

Direct Dealer agrees not to sell De Soto or Plymouth motor vehicles or parts or accessories to be exported or shipped within thirty (30) days after the date of such sale to a point in a second direct dealer's sales area outside the continental United States; and if any motor vehicle sold by Direct Dealer is so exported and shipped and remains in second direct dealer's sales area for ninety (90) days, then Direct Dealer upon request of De Soto shall divide the discount with the second direct dealer so that each shall have fifty per cent (50%) of such discount.

Direct Dealer agrees not to sell at wholesale any motor vehicles purchased from De Soto other than to his own authorized associate dealers, except that Direct Dealer may sell De Soto and/or Plymouth motor vehicles to other De Soto direct dealers at a handling charge to the selling Direct Dealer not to exceed five per cent (5%) of the Detroit delivered price of the vehicles sold.

2.

Prices and Discounts

De Soto will from time to time advise Direct Dealer of the prices of the vehicles and parts and accessories he buys from De Soto, and will furnish Schedules of Discount and Terms of Purchase to Direct Dealer.

3.

Orders for Motor Vehicles

In order to facilitate the orderly scheduling of production and shipments from week to week, Direct Dealer agrees to submit weekly his orders for new motor vehicles. Direct Dealer also agrees to comply with De Soto's request for annual or other estimates of Direct Dealer's prospective requirements of De Soto and Plymouth products, but such estimates are not to be regarded as orders or scheduled for production for Direct Dealer.

De Soto and Plymouth motor vehicles are made on Direct Dealer's order and are scheduled for production after Direct Dealer's order is received. Direct Dealer is expected to accept any motor vehicle ordered by him and scheduled for production. De Soto will not ship motor vehicles to Direct Dealer except on Direct Dealer's order. All orders are subject to approval and acceptance by De Soto at its principal place of business.

4.

Reports

Direct Dealer recognizes that De Soto in the conduct of its manufacturing operations, in the incurring of its commitments for raw materials, and in the employment of labor, needs for the intelligent direction of its affairs, up-to-date and accurate information on direct dealer and associate dealer stocks of cars, new and used, and on direct dealers and associate dealers retail sales; therefore, Direct Dealer agrees to cooperate with De Soto by reporting for himself and his associate dealers such information in such manner, at such times and on such forms as De Soto may from time to time request.

Direct Dealer recognizes the value of proper records and accounts and agrees to keep up to date De Soto uniform standard accounting system and procedure or some other system or procedure which will accomplish the same result. De Soto undertakes to cooperate with those dealers who furnish regular quarterly statements of their operations for comparative purposes in developing data and information for the purpose of improving dealer operations and profit possibilities through consultation and advice based on the comprehensive study of the information furnished by the reporting dealers.

5.

Direct Dealer Is Not Agent

For the protection of both Direct Dealer and De Soto, the relationship created by this agreement be-

tween De Soto and Direct Dealer is not that of principal and agent, and under no circumstances is Direct Dealer to be considered the agent of De Soto.

6.

Change in Price on Current Models

With a view to protecting Direct Dealer in the event of price changes on then current models, De Soto agrees that should it reduce the price on any then current model De Soto or Plymouth motor vehicle, De Soto will refund in cash or by a credit against current indebtedness to Direct Dealer with respect to each new, unused and unsold De Soto and Plymouth motor vehicle of such model purchased by Direct Dealer that is in Direct Dealer's stock or in the stock of his associate dealers of record with De Soto at the time such reduction was made, an amount equal to the difference between the ultimate cost to Direct Dealer at the former price and at the reduced price, provided claim for such refund supported by evidence satisfactory to De Soto is made by Direct Dealer in writing within thirty (30) days of the effective date of such reduction in price. Direct Dealer agrees to make refunds to his associate dealers upon the same basis and under similar conditions.

De Soto will advise Direct Dealer of any increase in price on any then current model De Soto or Plymouth motor vehicle. Direct Dealer may cancel any orders placed by him previous to the giving of such

notice for motor vehicles affected by the price increase.

7.

Reasons for Termination Other Than by Notice

While it is the desire of De Soto to establish lasting arrangements with Direct Dealer, it is recognized that certain conditions may arise in which it is impracticable for this agreement to continue in effect. In the interest of friendly relations between Direct Dealer and De Soto, it is important that the circumstances be set forth so that they may be thoroughly understood by both parties to this agreement. Accordingly it is agreed that this agreement shall terminate immediately by its own force without notice from either party in the event of (1) an attempted assignment of this agreement by Direct Dealer without De Soto's written consent; (2) an assignment by Direct Dealer for the benefit of creditors; (3) the admitted insolvency of Direct Dealer; (4) the institution of voluntary or involuntary proceedings by or against Direct Dealer in bankruptcy or under insolvency laws or for corporate reorganization, or for a receivership or for the dissolution of Direct Dealer; (5) the admitted insolvency of any member of Direct Dealer if a partnership; (6) the assumption of any other line of motor vehicles for sale by Direct Dealer, without the written consent of the General Sales Manager or an executive officer of De Soto; or (7) the discontinuance of Direct Dealer's distribution and resale in his sales area of the products herein referred to. Termination under

this paragraph shall not impose any liability upon De Soto under the provisions of Paragraph 8. It is further agreed by Direct Dealer that he will immediately advise De Soto in writing of the occurrence of any event specified in this paragraph.

8.

Termination by Notice

It is also recognized that certain other conditions may arise under which either party may desire to terminate this agreement by giving reasonable notice to the other party. Accordingly it is agreed that this agreement may be terminated, at any time upon not less than ninety (90) or more than ninety-five (95) days' written notice by De Soto or upon not less than fifteen (15) or more than twenty (20) days' written notice by Direct Dealer, but either of these periods may be reduced by mutual written consent of Direct Dealer and De Soto. Termination under the provisions of this Paragraph 8 by De Soto shall not be effective unless the notice bears the written approval of the General Sales Manager or an executive officer of De Soto. Termination of this agreement shall operate as a cancellation of all unfilled orders for motor vehicles, parts and accessories. Upon termination under the provisions of this Paragraph 8 by De Soto or by Direct Dealer, De Soto agrees to buy, and Direct Dealer agrees to sell within (30) days after the effective date of termination:

- (a) All new and unused then current model De

Soto and Plymouth motor vehicles which were purchased by Direct Dealer from De Soto and/or Chrysler Motors of California and are then the property of and in the possession of Direct Dealer, at the net invoice price to Direct Dealer current at the date of termination, including transportation charges paid by Direct Dealer, except vehicles built on Direct Dealer's specific order to other than De Soto standard specifications, which special vehicles, together with all special equipment pertaining thereto as previously specially specified by Direct Dealer, may or may not be purchased by De Soto at its option.

(b) All new, unused and undamaged De Soto and Plymouth parts for the then current and three (3) preceding models, which were purchased by Direct Dealer from De Soto and/or Chrysler Motor Parts Corporation and/or Chrysler Motors of California and/or any authorized Chrysler Corporation Parts Wholesaler, and are then the property of and in the possession of Direct Dealer, at the net invoice price to Direct Dealer then current at the date of termination, exclusive of transportation charges thereon, less any necessary costs incurred by De Soto for refinishing or reconditioning parts to restore them to their original salable condition. Prior to such purchase by De Soto, Direct Dealer shall deliver said parts for inspection F.O.B. Factory or any other point designated by De Soto.

(c) All signs of a type recommended by De Soto belonging to Direct Dealer, showing the names

“De Soto” or “Plymouth,” at a price to be agreed upon by De Soto and Direct Dealer.

Upon termination under the provisions of this Paragraph 8 by De Soto, but not on termination by Direct Dealer, De Soto also agrees to buy within thirty (30) days after the effective date of termination on written request of Direct Dealer:

(a) All then current De Soto and Plymouth new, unused and undamaged accessories or accessories packages complete as supplied to and purchased by Direct Dealer from De Soto and/or Chrysler Motors Parts Corporation and/or Chrysler Motors of California during the six (6) months immediately preceding the effective date of such termination and which are then the property of and in the possession of Direct Dealer, at the net invoice price paid by Direct Dealer, exclusive of transportation charges thereon paid by Direct Dealer. Prior to such purchase by De Soto, Direct Dealer shall deliver said accessories for inspection F.O.B. Factory or any other point designated by De Soto.

(b) Special tools of a type recommended by De Soto, adapted only to the servicing of De Soto and Plymouth motor vehicles and purchased by Direct Dealer during the twelve (12) months immediately preceding the effective date of such termination at a price and under terms and conditions to be agreed upon by De Soto and Direct Dealer.

9.

Transactions After Termination

In the event the agreement is terminated, the acceptance of orders from Direct Dealer by De Soto or the continuance of the sale of products herein referred to in Direct Dealer's sales area or the referring of inquiries to Direct Dealer by De Soto or any other act of De Soto shall not be construed as a renewal of the agreement nor as a waiver of the termination, but nevertheless all such transactions shall be governed by terms identical with the terms of the agreement.

10.

Use of Trade Names

Direct Dealer and De Soto desire to protect the public from confusion or uncertainty or misleading misrepresentation. Direct Dealer agrees not to use in his corporate, firm or individual name, or allow to be used by others in their corporate, firm or individual names, in so far as he has any power to prevent such use, the words "De Soto" and/or "Plymouth" and/or any other name adopted by De Soto for motor vehicles, parts, accessories or service, or any words or names or combination of words or names closely resembling any of them except with the written approval of De Soto. Direct Dealer agrees that upon termination of this agreement, he will immediately discontinue the use of names, trademarks, signs, stationery, advertising, or any-

thing else that might make it appear that he is still handling De Soto and Plymouth vehicles, parts and accessories.

11.

Assignment of Associate Dealer Agreements

Direct Dealer and De Soto desire to protect the public served by associate dealers operating under Direct Dealer and to protect these associate dealers in their business. Therefore, upon termination of this agreement, the termination shall, subject to the option of De Soto to disaffirm, operate as an assignment by Direct Dealer to De Soto of all associate dealer agreements which Direct Dealer shall have entered into, including all the rights, title and interest therein vested in Direct Dealer at the effective date of the termination. Direct Dealer will execute and deliver written assignments of said associate dealer agreements to De Soto upon request of De Soto. Nothing contained in this Paragraph 11 or in any such assignment shall make or be construed to make De Soto responsible for any previous obligations, acts or defaults of Direct Dealer under said agreements nor shall Direct Dealer be relieved or released from obligations previously incurred under the said associate dealer agreements. The option of De Soto to disaffirm any assignment effected under this Paragraph 11 may be exercised by notification to associate dealer at any time after the effective date of termination of this agreement.

12.

Former Agreements

This agreement cancels all prior agreements, verbal or written, between De Soto and Direct Dealer. No representative of either party except as herein explicitly provided has any authority to waive any of the provisions of this agreement or to modify or change any of its terms, and no change, addition or erasure of any printed portion of this agreement (except filling in of blank spaces and lines) shall be valid or binding upon either party.

13.

Sale for Resale by Unauthorized Persons

Purchasers of De Soto and Plymouth products expect them to operate properly and to secure prompt service of them. To this end as well as in the interest of fair dealing between direct dealers themselves and direct dealers and other dealers, and as a matter of protection of each other's sales area, Direct Dealer agrees not to participate in the sale or attempted sale of any De Soto or Plymouth motor vehicle to unauthorized dealers, sales and service connections, or any other unauthorized person, firm or corporation for the purpose of resale. If any De Soto or Plymouth motor vehicle is so sold by Direct Dealer to any unauthorized dealer, sales and service connection or any other unauthorized person, firm or corporation, and is thereafter resold or offered for resale as a new motor vehicle or as a demonstrator within ninety (90) days after the date of such sale

thereof by Direct Dealer, Direct Dealer agrees to pay to De Soto, immediately upon request of De Soto, Seventy-five Dollars (\$75.00) for each vehicle so resold or offered for resale, as liquidated damages to compensate dealer in whose sales area such motor vehicle was resold or offered for resale to a retail purchaser for injury suffered as the result of such unauthorized resale or offering for resale in his sales area. Such liquidated damages may, at the option of De Soto, be charged by De Soto against the parts account of offending Direct Dealer or may be included in the amount of any draft covering shipment of De Soto or Plymouth products to offending Direct Dealer. In no event shall Direct Dealer be charged more than Seventy-five Dollars (\$75.00) on any one motor vehicle so resold or offered for resale. While De Soto is under no legal obligation to collect any money whatsoever hereunder, it is the intention of De Soto to enforce the provisions of this paragraph. If said resale or offer for resale shall occur in the sales area of more than one authorized dealer, De Soto will divide equitably between such dealers the money collected by it as aforesaid, and the decision of De Soto regarding the division of compensation between dealers in the sales area in which such motor vehicle was resold or offered for resale shall be final.

14.

Relations Between Dealers

In the interest of fair dealing between direct dealers themselves and direct dealers and other

dealers, and as a matter of protecting each other's sales area and with a view to promoting good service to the public, Direct Dealer agrees to confine his selling efforts entirely to the sales area assigned to him by De Soto and agrees that he will not by personal solicitation, advertising, correspondence, resident salesmen, unofficial representation or by any other connection or means, directly or indirectly solicit, or induce any other person to solicit on his behalf, the sale of new and unused De Soto or Plymouth motor vehicles, or demonstrators, in any other sales area.

For each breach of the provisions of this Paragraph 14, resulting in a sale of a new and unused De Soto or Plymouth motor vehicle or demonstrator, Direct Dealer agrees to pay to De Soto as liquidated damages for equitable division between authorized dealer or dealers who, in the opinion of De Soto, are injured by the improper sale, the sum of Seventy-five Dollars (\$75.00) to compensate them for the injury. The provisions of this Paragraph 14 shall not apply to sales solicitation by a dealer of any quantity purchaser who has a main or branch office or authorized representative's headquarters within the sales area of the selling dealer.

The decision of De Soto on all matters in connection with claims arising under this Paragraph 14 shall be final.

15.

Sales by De Soto to Quantity Purchasers

Direct Dealer and De Soto recognize that there are certain types of buyers to which De Soto should offer to sell its products directly. Therefore, De Soto reserves the right to sell any products referred to in this agreement to its Employees, to Governmental Bodies, to Fleet Buyers for their own use or for the use of their agents, or representatives, to Taxicab or Drive-It-Yourself Companies, so-called, or to businesses purchasing chassis in quantities for installation of their own body equipment.

16.

Sales by De Soto to Others Than
Quantity Purchasers

De Soto shall also have the right to sell to any person, firm or corporation other than a Quantity Purchaser, for their own use or for the use of their agents or representatives, any products referred to in this agreement, but in case any such sales of vehicles referred to in this Paragraph 16 are made as a result of solicitation by De Soto or its representatives, to such person, firm or corporation, De Soto agrees to pay Seventy-five Dollars (\$75.00) for each vehicle so sold to Direct Dealer in whose sales area the sale was made. If such sale last above referred to occurred in the sales area of more than one authorized dealer, De Soto will make equitable division of the said Seventy-five Dollars (\$75.00) between the dealers affected. The decision of De Soto

on all matters in connection with claims arising under this paragraph 16 shall be final.

17.

Purchase and Supply of Parts

Direct Dealer and De Soto recognize the importance to them, to the public and to the owners of De Soto and Plymouth products that the products be safe and operable in accordance with De Soto's standards of manufacture. Direct Dealer therefore agrees that he will not sell for use on De Soto or Plymouth motor vehicles any parts except such as are purchased from or have the written approval of De Soto.

Direct Dealer agrees at all times to keep on hand in his own place of business and with his dealers a supply of then current De Soto and Plymouth parts sufficient to supply adequately the requirements of the sales area allotted to Direct Dealer.

Direct Dealer agrees to maintain an adequate stock record system; agrees upon request but not more often than once in each calendar year to provide De Soto, on forms to be furnished by it, with detailed identified inventories of De Soto and Plymouth parts; such records and inventories being for the purpose of enabling De Soto to counsel with Direct Dealer on Direct Dealer's continuous and adequate stock of parts consistent with the requirements of Direct Dealer's sales area.

18.

Advertising

Direct Dealer recognizes that advertising of De Soto and Plymouth products may affect other dealers and De Soto. For the protection of good will in De Soto and Plymouth products, Direct Dealer, in the sale of De Soto and Plymouth motor vehicles, agrees to use only advertising that is supplied or approved by De Soto or that conforms to the policies of De Soto, and to the provisions of this agreement; and agrees to discontinue advertising disapproved by De Soto.

19.

Waiver of Default

No waiver by De Soto of any default in the performance of any part of this agreement by Direct Dealer shall apply to or be deemed a waiver of any other default hereunder.

20.

Legal Interpretation

This agreement shall be interpreted and construed according to the laws of the State of Michigan, and shall bind the heirs, executors, administrators, successors and assigns of both parties. If it shall be found that any portion of this agreement violates in any particular any law of the United States or of any state in the United States having jurisdiction, such portion or portions of the agreement shall be of no force and effect in that political unit, division

or subdivision in which they are illegal or unenforceable, and the agreement shall be treated as if such portion or portions had not been inserted.

21.

Chrysler Motors of California

Wherever in this agreement the word "De Soto" is used, it shall be construed to include the words "and/or Chrysler Motors of California" the same as though they were written therein.

22.

Definition of Words "Motor Vehicles"

The words "motor vehicle" or "motor vehicles," wherever used in this agreement, shall be taken to include De Soto and/or Plymouth chassis, passenger cars, delivery and commercial cars.

23.

Collection of Indebtedness

De Soto shall have the right to apply upon the payment of any amount due De Soto from Direct Dealer, any sum of money or part thereof belonging to Direct Dealer which may be in De Soto's possession, and De Soto may at its option collect any sums owing by Direct Dealer to De Soto by separate draft or by including such sums in any draft covering the purchase of motor vehicles. Direct Dealer shall pay with the amount of each draft all exchange and collection charges.

24.

Force Majeure

Neither De Soto nor Direct Dealer will be liable for failure to perform its part of this agreement when the failure is due to fire, flood, strikes or other industrial disturbances, inevitable accident, war, riot, insurrection or other causes beyond the control of the parties.

25.

Signature

This agreement to be valid must bear the signature of a duly authorized officer or executive of De Soto; also the signature of a duly authorized officer or executive of Direct Dealer if a corporation; or the signature of one of the partners of Direct Dealer if a partnership; or the signature of Direct Dealer if an individual.

²⁵

Acceptance Recommended:

By /s/ JAMES B. WOOD,
District Manager;

By /s/ A. H. LANGRIDGE,
Regional Manager.

In Witness Whereof, the parties hereto have signed this agreement which is finally executed at Detroit, Michigan, in duplicate, this 12th day of December, 1949.

RENNIE & LAUGHLIN, INC.,
(Direct Dealer—Firm Name)

By /s/ J. C. RENNIE,

President.

(Individual authorized to sign)

CHRYSLER CORPORATION,

By /s/ J. B. WAGSTAFF,

General Sales Manager—

De Soto Division.

Received December 12, 1949.

EXHIBIT B

No. 3538

Duplicate for Direct Dealer

Sales Agreement

Between

De Soto Direct Dealer

and

Chrysler Corporation

De Soto Division

No. 3538

Duplicate for Direct Dealer

Memorandum of Sales Locality
and Dealers Management

This memorandum hereby is made a part of De Soto Direct Sales Agreement dated the 20th day of February, 1952, and bearing the same number as this Memorandum.

1.

Sales Locality

The Sales Locality for resale in which Direct Dealer shall have the non-exclusive right to purchase from De Soto De Soto and Plymouth motor vehicles and De Soto and Plymouth motor vehicle parts and accessories is as follows: Los Angeles, California, and vicinity.

The Sales Zone in which Direct Dealer will provide and maintain adequate facilities for selling and servicing De Soto and Plymouth vehicles is as follows:

Zone No. 1 Boundaries:

Bounded by a line starting at a point formed by the intersection of Santa Barbara Avenue and Figueroa Street; North on Figueroa Street to the intersection of Exposition Boulevard and Hoover Street; North on Hoover Street to Beverly Boulevard; then East and South on Beverly Boulevard to 2nd Street; East and South on 2nd Street to Alameda Street; North on Alameda Street to 1st Street; East on 1st Street to Mission Road; North on Mission Road to the intersection of Macy Street; then Northeast on Mission Road and Huntington Drive to Eastern Avenue; then South on Eastern Avenue to Valley Boulevard; thence South and West on a straight line to the intersection of Brooklyn Avenue and Lorena Street; continue South and West on Lorena Street to the A.T.&S.F.R.R. tracks; thence North-

east on a straight line to the intersection of Alameda Street and Olympic Boulevard; South on Alameda Street to 25th Street; thence West along Pacific Electric carline to Central Avenue; South on Central Avenue to Jefferson; Northeast on Jefferson to Avalon Boulevard; South on Avalon Boulevard to Santa Barbara Avenue; West on Santa Barbara Avenue to Figueroa Street, the point of Beginning.

2.

Direct Dealer's Management

De Soto has entered into this agreement relying upon the active and substantial personal participating in the management of Direct Dealer's organization by J. C. Rennie, President.

3.

Direct Dealer's Capital Stock

If Direct Dealer is a corporation the persons that Direct Dealer represents in De Soto Direct Dealer Sales Agreement of which this Memorandum is a part own the capital stock of Direct Dealer are set forth below and the number of shares of capital stock that each owns is set forth opposite his name.

Name	Number of Shares Each Holds
J. C. Rennie, President.....	38,250
W. F. Laughlin, Vice Pres. & Treas.....	36,750
Total Shares Outstanding.....	75,000

In witness whereof the parties to De Soto Direct Dealer Sales Agreement to which this memorandum is attached, have signed this memorandum which is finally executed at Detroit, Michigan, in duplicate this 20th day of February, 1952.

RENNIE & LAUGHLIN, INC.,
(Direct Dealer—Firm Name)

By /s/ J. C. RENNIE,
(Individual authorized to sign)
President.
(Title)

CHRYSLER CORPORATION,
By /s/ J. B. WAGSTAFF,
(General Sales Manager—
De Soto Division).

Attach Signed Memorandum of Sales Locality and
Dealer's Management to this Page

De Soto Direct Dealer Sales Agreement

This Agreement is made by and between Rennie & Laughlin, Inc., located at 1220 E. 7th St., L.A., Los Angeles, California, a Corporation, below called Direct Dealer, and Chrysler Corporation, a Delaware Corporation, for its De Soto Division. Below called De Soto.

The parties agree as follows:

1.

Sales Locality and Place of Business

Direct Dealer shall have the non-exclusive right to purchase from De Soto De Soto and Plymouth motor vehicles and De Soto and Plymouth motor vehicle parts and accessories, for resale in the Sales Locality described in the Memorandum of Sales Locality and Dealer's Management signed by the parties hereto on the same date as this agreement, and bearing the identifying number above (hereinafter called the Sales Locality):

That Memorandum is hereby incorporated in and made a part of this agreement.

2.

Direct Dealer's Management

De Soto has entered into this agreement relying upon the active and substantial personal participating in the Management of Direct Dealer's business by the individuals named in the Memorandum of Sales Locality and Dealer's Management.

3.

Direct Dealer's Capital Stock

If Direct Dealer is a corporation, Direct Dealer represents that the persons named in the Memorandum of Sales Locality and Dealer's Management own the capital stock of Direct Dealer in the

amounts set forth opposite their names, and De Soto enters into this agreement relying upon their owning Direct Dealer's stock in those amounts.

4.

Selling

Direct Dealer will sell energetically the motor vehicles, parts and accessories he buys from De Soto and will provide and maintain in the Sales Locality adequate facilities for selling and servicing them.

Direct Dealer will render prompt, efficient and courteous service to De Soto and Plymouth customers, carrying out all the provisions of the Owner's Service Certificate.

5.

Prices and Terms of Purchase

De Soto will endeavor to advise Direct Dealer from time to time by bulletin or other postal or telegraphic communication of the prices and terms of purchase of the motor vehicles and parts and accessories Direct Dealer buys from De Soto, but De Soto reserves the right to change prices and terms of purchase without notice.

6.

Direct Dealer is not Agent

This Agreement does not create the relation of principal and agent between De Soto and Direct Dealer, and under no circumstances is either party to be considered the agent of the other.

7.

Change in Price on Current Models

De Soto agrees that should it reduce the price on any then current model De Soto or Plymouth motor vehicle, De Soto will refund to Direct Dealer in cash or by a credit against then current indebtedness an amount equal to the difference between the reduced price and the price at which Direct Dealer purchased each new, unused and unsold De Soto and Plymouth motor vehicle of that model that at the time of the reduction is in Direct Dealer's stock, provided Direct Dealer makes a written claim for refund, supported by evidence satisfactory to De Soto, within thirty (30) days of the effective date of the reduction in price.

De Soto will notify Direct Dealer of any increase in price on any then current model De Soto or Plymouth motor vehicle. Direct Dealer may cancel any unfilled and unshipped orders for motor vehicles affected by the price increase that he placed before De Soto gave the notice.

8.

Termination

Either party may terminate this agreement upon not less than ninety (90) days' written notice. Termination by De Soto shall not be effective unless the President, Vice-President or General Sales Manager of De Soto signs the notice.

Termination of this agreement shall cancel all unfilled orders for motor vehicles, parts and accessories. De Soto agrees to buy and Direct Dealer agrees to sell within ninety (90) days after the effective date of any termination under this paragraph 8:

(a) All new and unused then current model De Soto and Plymouth motor vehicles in good condition which were purchased by Direct Dealer from De Soto and are then the property of and in the possession of Direct Dealer, at the net invoice price to Direct Dealer current at the date of termination, including transportation charges paid by Direct Dealer, except vehicles built on Direct Dealer's specific order to other than De Soto standard specifications, which special vehicles, together with all special equipment pertaining thereto previously specified by Direct Dealer, may or may not be purchased by De Soto at De Soto's option.

(b) All new, unused and undamaged De Soto and Plymouth parts for the then current and three (3) preceding models, that were purchased by Direct Dealer from De Soto and/or any authorized Chrysler Corporation Parts Wholesaler, and are then the property of and in the possession of Direct Dealer, at the applicable prices therefor to Direct Dealer less maximum allowable discounts current at the date of termination, exclusive of transportation charges on them, less any necessary costs incurred by De Soto for refinishing or reconditioning parts to restore them to their original salable condition. Prior to purchases by De Soto, Direct Dealer

shall deliver the parts for inspection F.O.B. Factory or any other point De Soto shall designate.

(c) All signs of a type recommended by De Soto belonging to Direct Dealer, showing the names "De Soto" or "Plymouth," at a price to be mutually agreed upon by De Soto and Direct Dealer.

(d) All then current De Soto and Plymouth new, unused and undamaged accessories or accessories packages complete as supplied to and purchased by Direct Dealer from De Soto during the six (6) months immediately preceding the effective date of the termination and that are then the property of and in the possession of Direct Dealer at the applicable prices therefor to Direct Dealer less maximum allowable discounts current at the date of termination, exclusive of transportation charges on them paid by Direct Dealer. Prior to such purchase by De Soto, Direct Dealer shall deliver the accessories for inspection F.O.B. Factory or any other point designated by De Soto.

(e) Special tools of a type recommended by De Soto, adapted only to the servicing of De Soto and Plymouth motor vehicles and purchased by Direct Dealer during the twelve (12) months immediately preceding the effective date of the termination at a price and under terms and conditions to be agreed upon by De Soto and Direct Dealer.

Notwithstanding the provisions above, this agreement shall terminate automatically without notice from either party upon the death of direct Dealer if

he is an individual; or upon an attempted assignment of this agreement by Direct Dealer; or an assignment by Direct Dealer for the benefit of creditors; or the admitted insolvency of Direct Dealer or of any member of Direct Dealer if it is a partnership, or the institution of voluntary or involuntary proceedings by or against Direct Dealer in bankruptcy or under insolvency laws or for corporate reorganization, or for a receivership or for the dissolution of Direct Dealer.

9.

Transactions After Termination

After this agreement is terminated, if De Soto accepts orders from Direct Dealer or refers inquiries to Direct Dealer or takes any other action, De Soto's acts shall not renew this agreement or waive the termination. Nevertheless all such transactions shall be governed by the same terms that this agreement provides, so far as those terms are applicable.

10.

Use of Trade Names

Direct Dealer will not use in his corporate, firm, or individual name, or allow others to use in their corporate, firm, or individual names, insofar as he has power to prevent the use, the words "De Soto," "Plymouth," "MoPar" and/or any other name adopted by De Soto for motor vehicles, parts, accessories or service, or any words or names or combination of words or names closely resembling any of

them. Upon termination of this agreement Direct Dealer will discontinue immediately using names and trade-marks adopted or used by De Soto and signs, stationery, advertising, or anything else that might make it appear that he is an authorized dealer for De Soto or Plymouth motor vehicles, parts and accessories.

11.

Sales by De Soto

De Soto reserves the right to sell any products referred to in this agreement within the Sales Locality to other dealers or persons, Governmental Bodies, Fleet Buyers, Taxi-cab or Drive-It-Yourself Companies, so-called, or to businesses purchasing chassis in quantities for installing their own body equipment.

12.

Purchase and Supply of Parts

It is important to De Soto, to Direct Dealer, to the owners of De Soto and Plymouth products and to the general public that the products be safe and operable in accordance with De Soto's standards of manufacture. Direct Dealer therefore agrees that he will not sell, offer for sale or use in the repair of De Soto or Plymouth motor vehicles, as genuine new De Soto or Plymouth repair parts, any part or parts except those manufactured by or for De Soto, designed for use on De Soto and Plymouth products, and distributed by or having the written approval of De Soto.

Direct Dealer at all times will keep on hand in his own place of business a supply of De Soto and Plymouth parts sufficient to render adequate service to De Soto and Plymouth customers.

13.

Advertising

To protect its customers and the public and to maintain good will toward De Soto, Direct Dealer, and De Soto and Plymouth products, Direct Dealer, in selling and servicing De Soto and Plymouth motor vehicles, will use only advertising that conforms to the policies of De Soto or is specially ordered for Direct Dealer at his request by De Soto; and will discontinue advertising disapproved by De Soto.

14.

Collection of Indebtedness

De Soto may apply towards the payment of any amount due De Soto from Direct Dealer, any credit belonging to Direct Dealer, and De Soto at its option may collect any sums owing by Direct Dealer to De Soto by making a separate draft or by including such sums in any draft covering the purchase of motor vehicles. Direct Dealer shall pay with the amount of each draft all exchange and collection charges.

15.

Force Majeure

Neither Direct Dealer nor De Soto will be liable for failure to perform its part of this agreement

when the failure is due to fire, flood, strikes, or other industrial disturbances, inevitable accident, war, riot, insurrection or other causes beyond the control of the parties.

16.

Notices

Any notice required or permitted under this agreement shall be in writing and shall be sufficient if delivered personally, or deposited in a United States Post Office as registered mail, postage prepaid, addressed, as appropriate, either to the Direct Dealer at the place of business designated in this agreement, or at such other address as Direct Dealer may designate in writing to De Soto, or to De Soto, at 6000 Wyoming Avenue, Detroit 31, Michigan, or such other address as De Soto may designate in writing to Direct Dealer.

17.

Delivery of Motor Vehicles

De Soto may deliver motor vehicles by rail, haul-away, boat, or any other means of transport, or deliver them for driveaway, in conformance with the policy of De Soto at the time. De Soto may deliver motor vehicles to a carrier that De Soto selects consigned to the city or town where Direct Dealer's place of business is located (or to an unloading point located conveniently near that city or town) "to De Soto's order, notify Direct Dealer," or may deliver them directly to Direct Dealer at Detroit,

Michigan, or at any other point that De Soto hereafter may establish.

18.

Basis of Payment

Direct Dealer shall pay De Soto in lawful money of the United States of America for motor vehicles and for any extra features and equipment the purchase price thereof in cash in advance or on sight-draft against bill of lading, with collection charges, if any, added. Until further notice the purchase price shall be the then current direct dealer net prices at factory Detroit, Michigan, or at any other point that De Soto may establish and provisions for federal taxes, plus the following charges on each motor vehicle:

(a) Five Dollars (\$5.00), which De Soto shall return to Direct Dealer on each motor vehicle that, in the opinion of De Soto, Direct Dealer accurately reports having sold and delivered to a customer; the report to be made on a Retail Delivery Record Form furnished by De Soto, properly filled in and mailed to De Soto not later than six (6) days after the date of sale to retail customer. De Soto shall remit to Direct Dealer before the end of the month following the month in which De Soto receives the Retail Delivery Record Form properly made out.

(b) A charge for special handling, whenever motor vehicles are decked, or staged, or when any special material and/or labor are employed in pre-

paring or handling vehicles for delivery to Direct Dealer.

(c) A charge for transportation and distribution in an amount to be determined by De Soto.

(d) A charge, if in effect at the time of shipment, for certificates of title, anti-freeze, and any other charges that are in effect at the time of shipment of motor vehicles to Direct Dealer.

19.

Title

The title to De Soto and Plymouth motor vehicles, parts and other merchandise that De Soto furnishes to Direct Dealer shall be and remain in De Soto until paid for in full, in cash. Negotiable instruments are received only as conditional payment.

20.

Acceptance of Orders

All orders are subject to acceptance by De Soto. Acceptance may be in part. De Soto shall not be liable for any loss or damage resulting from its not shipping or delivering goods ordered. De Soto will not ship motor vehicles to Direct Dealer except on Direct Dealer's order.

21.

Acceptance of Shipments

In the event Direct Dealer fails to pay sight-draft upon presentment, covering motor vehicles that he

has ordered, or fails to accept C.O.D. shipments of parts and/or other merchandise he has ordered, De Soto may divert the shipments to any other destination it may see fit, and charge Direct Dealer the demurrage, transport, storage and other expense arising by reason of the failure of Direct Dealer to accept and pay for shipments he has ordered.

22.

Risk of Loss or Damage

De Soto shall not be liable for loss or damage to any motor vehicles, parts or other merchandise after De Soto has delivered them to a carrier.

23.

Claims for Shortage

As a condition precedent to recovering for a shortage in any shipment, Direct Dealer must claim for it within ten (10) days after receiving the shipment, or in event of complete loss of shipment, then within three (3) months after date of shipment.

24.

Uniform Warranty

No warranties, express or implied, shall be deemed to have been made by either De Soto or the manufacturer of the products herein referred to, except the uniform warranty of the Automobile Manufacturers Association against defective materials or workmanship as follows:

“The Manufacturer warrants each new motor vehicle manufactured by it to be free from defects in material and workmanship under normal use and service, its obligation under this warranty being limited to making good at its factory any part or parts thereof, including all equipment or trade accessories (except tires) supplied by the Car Manufacturer, which shall, within ninety (90) days after making delivery of such vehicle to the original purchaser or before such vehicle has been driven four thousand (4,000) miles, whichever event shall first occur, be returned to it with transportation charges prepaid, and which its examination shall disclose to its satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied and of all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it, any liability in connection with the sale of its vehicles.

“This warranty shall not apply to any vehicle which shall have been repaired or altered outside of an authorized De Soto and/or Plymouth service station in any way so as, in the judgment of the Manufacturer, to affect its stability or reliability, nor which has been subject to misuse, negligence or accident.”

In order to be entitled to credit for parts under the above warranty, Direct Dealer must return them, if De Soto requests Direct Dealer to do so, with all charges prepaid, within the period of war-

ranty, to De Soto, Detroit, Michigan, or any other point De Soto may hereafter establish, properly tagged, accompanied by such form properly filled in as De Soto may furnish from time to time, giving serial and motor numbers of the vehicle from which the parts were taken, the number of miles that the vehicle had been operated at the time the parts were removed, the name and address of the owner, the date of sale, and such other and further information as De Soto may require. All parts returned must be accompanied by Notice of Disposal in case claim for defect is not allowed. In the absence of that Notice, De Soto may dispose of the parts and not be liable to Direct Dealer or any other person for them.

25.

Change of Models, Parts and Accessories Declared Obsolete or Discontinued

De Soto at any time may discontinue any models; it may revise, change or modify their construction or classification; and all orders refer to models current at the time De Soto receives the orders unless otherwise specified. De Soto at any time may declare obsolete, or may discontinue, any or all parts and accessories for any of its motor vehicles. De Soto may act under this paragraph 25 without notice, and without incurring any obligation to Direct Dealer by reason of his previous purchases.

26.

Prices to Direct Dealer on Parts

De Soto from time to time will notify Direct Dealer of the prices and terms of purchase of De Soto and Plymouth repair parts. Until further notice, De Soto and Plymouth parts shall be billed to Direct Dealer at the then current net prices or discounts off factory retail prices at factory, Detroit, Michigan, or at any other point De Soto may hereafter establish.

27.

Delivery of Parts

De Soto may deliver parts to Direct Dealer by delivering to a carrier consigned to the city or town where Direct Dealer's place of business is located, or by delivering directly to Direct Dealer at loading docks at Detroit, Michigan, or any other point that De Soto hereafter may establish.

28.

Legal Interpretation

This agreement shall be interpreted and construed according to the laws of the State of Michigan. If it shall be found that any part of this agreement conflicts in any particular with any law of the United States or of any state in the United States having jurisdiction, such part or parts of the agreement shall be of no force and effect in that political unit, division or subdivision in which they are illegal or unenforceable, and the agreement as

to that political unit, division or subdivision, shall be treated as if such part or parts had not been inserted.

29.

Former Agreements and Waiver, Modification
or Assignment of this Agreement

This is the entire agreement between the parties relating to the purchase of Direct Dealer of new De Soto and Plymouth motor vehicles from De Soto for resale, and it cancels and supersedes all earlier agreements, written or oral, between De Soto and Direct Dealer, relating to the purchase by Direct Dealer of De Soto and Plymouth Motor vehicles.

No waiver, modification or change of any of the terms of this agreement shall be binding on De Soto, unless in writing and signed by the President, Vice-President or General Sales Manager of De Soto. No change or erasure of any printed part of this agreement or addition to it (except filling in of blank spaces and lines) shall be valid or binding upon De Soto, unless approved in writing by the President, Vice-President or General Sales Manager of De Soto.

Direct Dealer may not assign this agreement without the written consent of De Soto, executed by the President, Vice-President or General Sales Manager of De Soto.

30.

Signature

This agreement to be valid must bear the signature of the President, Vice-President or General

Sales Manager of De Soto; also the signature of a duly authorized officer or executive of Direct Dealer if a corporation; or the signature of one of the partners of Direct Dealer if a partnership; or the signature of Direct Dealer if an individual.

In Witness Whereof, the parties hereto have signed this agreement which is finally executed at Detroit, Michigan, in duplicate, this 20th day of February, 1952.

RENNIE & LAUGHLIN Inc.,
(Direct Dealer—Firm Name)

By /s/ J. C. RENNIE,
(Individual Authorized
to Sign)
President.

CHRYSLER CORPORATION,

By /s/ J. B. WAGSTAFF,
General Sales Manager—
De Soto Division.

Received February 14, 1952.

Duly verified.

Complaint Amended, April 5, 1956.

[Endorsed]: Filed August 8, 1955.

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME FOR DEFENDANT TO ANSWER OR OTHERWISE PLEAD

It Is Hereby Stipulated by and between plaintiff Rennie & Laughlin, Inc., a California corporation, and defendant Chrysler Corporation, a Delaware corporation, through their respective attorneys, that the above-mentioned defendant Chrysler Corporation may have to and including March 9, 1956, in which to answer or otherwise plead with respect to the Complaint herein. This stipulation is made to grant defendant adequate time within which to ascertain the facts required to plead to the Complaint.

Dated: February 16, 1956.

SPRAY, GOULD & BOWERS,

By /s/ ROBERT E. FORD,

Attorneys for Plaintiff.

McCUTCHEN, BLACK, HARNAGEL & GREENE,
G. WILLIAM SHEA,
JACK T. SWAFFORD,

By /s/ JACK T. SWAFFORD,

Attorneys for Defendant.

It Is So Ordered This 16th day of February,
1956.

/s/ JAMES M. CARTER,

Judge of the United States
District Court.

[Endorsed]: Filed February 16, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION UNDER RULE 12, FED-
ERAL RULES OF CIVIL PROCEDURE,
FOR A DISMISSAL OF THE COMPLAINT
HEREIN FOR FAILURE TO STATE A
CLAIM UPON WHICH RELIEF CAN BE
GRANTED, AND, IN THE ALTERNA-
TIVE, FOR A MORE DEFINITE STATE-
MENT

To the Above-Named Plaintiff and Spray, Gould &
Bowers, Its Counsel:

You will please take notice that defendant
Chrysler Corporation will move this court in Court
Room 3 of the United States Post Office and Court
House Building, 312 North Spring Street, in the
City of Los Angeles, State of California, on March
12, 1956, at 10:00 o'clock a.m., or as soon thereafter
as counsel can be heard, as follows:

1. For a dismissal of the complaint herein under
Rule 12(b)(6) of the Federal Rules of Civil Pro-
cedure because it fails to state a claim against de-
fendant upon which relief can be granted.

And, in the alternative,

2. Under Rule 12 (e) of the Federal Rules of Civil Procedure, for a more definite statement because of the following defects in said complaint:

(a) Defendant cannot ascertain from the existing allegations of Paragraph VIII of the complaint what representative of defendant was advised by plaintiff in September, 1951, that plaintiff desired to sell its business. Defendant also cannot ascertain whether such advice was given orally or in writing. Defendant is further unable to know from the existing allegations what agents of defendant advised plaintiff that such agents would secure a buyer for plaintiff and whether such advice was given orally or in writing.

(b) Defendant cannot ascertain from the existing allegations of Paragraph IX of the complaint who were the agents of defendant referred to in said paragraph.

(c) Defendant cannot ascertain from the existing allegations of Paragraph X of the complaint what representatives or employees of defendant had the knowledge and gave the consent attributed to defendant by the allegations in Paragraph X. Defendant also is unable to learn from the allegations of Paragraph X whether the "final sale" referred to therein was made by an oral or written agreement.

(d) Defendant is unable to ascertain from the allegations of Paragraph XI of the complaint what

employees or representatives of defendant acted on behalf of defendant in the alleged advice by defendant to plaintiff that defendant would not consent to plaintiff's sale of its business and whether such advice was given orally or in writing.

(e) Defendant cannot ascertain from the allegations of Paragraph XIII of the complaint whether the management contract therein referred to was oral or in writing or what the date of said contract was.

(f) Defendant cannot ascertain from the allegations of Paragraph XIV of the complaint what the dollar amount of the losses therein referred to were or the period in which said losses were sustained.

Said motions will be based upon the complaint herein, this notice of motion and the memorandum of points and authorities attached hereto and filed herewith.

Dated: February 29, 1956.

McCUTCHEN, BLASK, HARN-
AGEL & GREENE,
G. WILLIAM SHEA,
PHILLIP K. VERLEGER,
JACK T. SWAFFORD,

By /s/ G. WILLIAM SHEA,
Attorneys for Defendant,
Chrysler Corporation.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 1, 1956.

[Title of District Court and Cause.]

STIPULATION RE CONTINUANCE
OF MOTION

It Is Hereby Stipulated by and Between the Parties Hereto, through their respective counsel, that the above-entitled motion heretofore set for March 12th, 1956, at 10:00 o'clock a.m., in Courtroom No. 6 of the above-entitled Court, may be continued to March 19th, 1956, at the same time and place.

Dated March 8th, 1956.

SPRAY, GOULD & BOWERS,

By /s/ CHARLES P. GOULD,
Attorneys for Said Plaintiff.

McCUTCHEN, BLACK, HARN-
AGEL & GREENE,
G. WILLIAM SHEA,
PHILIP K. VERLEGER,
JACK T. SWAFFORD,

By /s/ JACK T. SWAFFORD,
Attorneys for Defendant,
Chrysler Corporation.

It Is So Ordered.

/s/ ERNEST A. TOLIN,
Judge.

[Endorsed]: Filed March 9, 1956.

[Title of District Court and Cause.]

STIPULATION RE

1. Withdrawal of Motion to Dismiss and Alternative Motion.
2. Filing Amended Complaint.
3. Time Within Which Answer or Other Pleading to the Complaint Shall Be Filed.

Whereas, on March 1, 1956, defendant filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, or in the alternative, for a more definite statement, which motions were set for hearing on March 12, 1956, and

Whereas, at plaintiff's request the hearing on said motions was continued to March 19, 1956, at 10:00 o'clock a.m., in Courtroom No. 6 in the above-entitled court, and

Whereas, plaintiff desires to file an amended complaint so as to supply the deficiencies set forth in the alternative motion for a more definite statement.

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel:

1. That defendant's motions to dismiss the complaint for failure to state a claim upon which relief can be granted, and in the alternative, for a more definite statement, are withdrawn without prejudice to defendant, and defendant if it desires may file a new motion to dismiss upon the same ground or any other ground, and it may file a new motion for

a more definite statement based upon any claimed deficiencies in the amended complaint, whether complained about in the present motion or not;

2. That defendant's motion to dismiss shall not be deemed a "responsive pleading" within the meaning of Rule 15(a) of the Federal Rules of Civil Procedure, and that plaintiff may file an amended complaint in the above-entitled action; and

3. That defendant may have to and including April 6, 1956, within which to answer or otherwise plead to the complaint now on file herein.

Dated: March 14, 1956.

McCUTCHEN, BLACK, HARN-
AGEL & GREENE,
G. WILLIAM SHEA,
PHILIP K. VERLEGER,
JACK T. SWAFFORD,

By /s/ JACK T. SWAFFORD,
Attorneys for Defendant.

SPRAY, GOULD & BOWERS,
CHARLES P. GOULD,

By /s/ L. R. FRANKLEY,
Attorneys for Plaintiff.

It Is So Ordered.

Dated this 15th day of March, 1956.

/s/ ERNEST A. TOLIN.
Judge.

[Endorsed]: Filed March 15, 1956.

[Title of District Court and Cause.]

AMENDED COMPLAINT

(Breach of Contract)

Comes Now the Plaintiff and for cause of action against the defendant, complains and alleges, as follows:

I.

That at all times herein mentioned plaintiff was and now is a corporation duly organized under the laws of the State of California.

II.

That at all times herein mentioned defendant was and now is a corporation duly organized under and by virtue of the laws of the State of Delaware.

III.

That on or about the 12th day of December, 1949, Plaintiff and Defendant entered into a certain contract in writing in the State of Michigan, a copy of which is attached hereto as Exhibit A, and made a part hereof.

IV.

That by reason of said contract herein annexed as Exhibit A, Plaintiff was made a direct dealer by Defendant, with a non-exclusive right to purchase DeSoto and Plymouth motor vehicles and parts and accessories thereof for re-sale in the vicinity of Los Angeles, California, under the terms and conditions as are more fully set forth under said contract.

V.

That from the date of said contract, annexed hereto as Exhibit A, to wit, December 12, 1949, Plaintiff operated as a DeSoto and Plymouth Dealer in the vicinity of Los Angeles continuously through the period covered by this complaint.

VI.

That on or about the 20th day of February, 1952, Plaintiff and Defendant entered into a certain contract in writing in the State of Michigan, a copy of which is attached hereto as Exhibit B, and made a part hereof, under the terms of which Plaintiff continued to represent Defendant as a DeSoto and Plymouth Dealer in the vicinity of Los Angeles, California.

VII.

During the period commencing in the month of April, 1951, Plaintiff sustained an operating loss in its business as a direct Dealer for Defendant, which operating loss continued during the subsequent months of 1951; and in the month of July, 1951, President of Plaintiff corporation, and the active manager of Plaintiff's business, J. C. Rennie, sustained a heart attack which resulted in his hospitalization during July, and prevented the said J. C. Rennie from being able to devote his time and efforts to Plaintiff corporation.

VIII.

Due to the aforesaid losses being sustained by Plaintiff and the ill health of the President of

Plaintiff corporation, in September, 1951, Plaintiff advised Defendant through its Regional Manager, A. H. Langridge, acting for and on behalf of said Defendant, of its desire to sell its business. The said A. H. Langridge advised Plaintiff that Defendant would secure a buyer for Plaintiff corporation who was not only financially able to purchase said business, but one who would be acceptable to Defendant.

IX.

On or about the 1st day of October, 1951, Plaintiff corporation commenced negotiations with one Darwin C. McCredie and one George Peck for the purchase of Plaintiff's business, said buyers having been referred to Plaintiff corporation by the said A. H. Langridge acting for and on behalf of Defendant.

X.

Thereafter, with the full knowledge and consent of the said A. H. Langridge and other agents of Defendant, negotiations were had with said prospective purchasers which resulted in a final sale being made of Plaintiff's business to said prospective buyers on October 26, 1951; and by the terms of said agreement of sale said prospective buyers agreed to pay Plaintiff corporation Seventy-Seven Thousand Nine Hundred Twenty-one and 69/100 (\$77,921.69) Dollars, and in addition thereto said prospective purchasers agreed to assume the lease under which Plaintiff corporation was operating its business and assume all business and corporate expenses after the date of said sale; and it was fur-

ther agreed, on said date, that the formal contract of sale would be made on the 27th day of October, 1951, and the purchase price paid at that time.

XI.

On or about the 27th day of October, 1951, prior to the completion of said sale, the said A. H. Langridge advised the said Darwin C. McCredie and George Peck that Defendant had revoked its consent to the sale, whereupon the said McCredie and Peck refused to complete the said sale.

XII.

On or about the 6th day of November, 1951, Defendant's General Sales Manager, J. B. Wagstaff, advised Plaintiff that although Defendant had approved of the sale to the said McCredie and Peck, it had decided to revoke its consent in order to decrease the number of dealers in the area.

XIII.

That having consented to the aforesaid sale to said purchasers, Defendant's subsequent revocation of said consent constituted a breach of said sales contract annexed hereto as Exhibit A.

XIV.

That by reason of the failure and refusal of Defendant to consent to said sale of said business it was necessary that Plaintiff corporation enter into a management contract with said prospective purchasers wherein and whereby Plaintiff turned

over to said purchasers its entire business on a management basis.

XV.

Thereafter, by reason of continued losses during said management period, said business was closed by Plaintiff corporation and Plaintiff discontinued operating as a direct dealer for Defendant.

XVI.

That at all times herein mentioned Plaintiff fully performed all things required of Plaintiff by the terms of said contract, Exhibit A attached hereto.

XVII.

That by reason of the breach of said contract by Defendant by refusing to approve the sale of said business by Plaintiff as aforesaid, Plaintiff was not paid and received no part of said sale price for said business, to wit, the sum of Seventy-Seven Thousand Nine Hundred Twenty-one and 69/100 (\$77,921.69) Dollars, all to Plaintiff damage in said sum.

XVIII.

As a further proximate result of said Defendant's breach of said contract, plaintiff corporation, in the operation of its business from the date of the refusal of Defendants to allow the sale of the said business, to wit, the 27th day of October, 1951, to the date said business was finally terminated and closed, to wit, on the 31st day of March, 1954, Plaintiff corporation sustained losses in the amount of One Hundred Two Thousand Six Hundred Eighty-

six and 64/100 (\$102,686.64) Dollars, all to Plaintiff's further damage in said sum.

XIX.

Plaintiff, by reason of the acts of Defendant in refusing to permit the sale of said business of Plaintiff as aforesaid, and as a proximate result thereof, sustained damage to Plaintiff's reputation as an automobile dealer in the vicinity of Los Angeles, California which damage was irreparable, all to Plaintiff's further damage in the sum of Three Hundred Thousand and no/100 (\$300,000.00) Dollars.

XX.

That the acts of Defendant as aforesaid in refusing to permit said sale and transfer of plaintiff's business were without cause and arbitrary.

Wherefore, Plaintiff prays for judgment against the Defendant as follows:

1. The sum of Seventy-seven Thousand Nine Hundred Twenty-one and 69/100 (\$77,921.69) Dollars, by reason of the loss of the sale of Plaintiff corporation;

2. The sum of Seventy-Seven Thousand Nine Hundred Twenty-one and 69/100 (\$77,921.69) Dollars, by reason of the breach of said contract by said Defendant;

3. The sum of One Hundred Two Thousand Six Hundred Eighty-six and 64/100 (\$103,686.64) Dollars, by reason of Plaintiff's further damage as result of sustained losses;

4. The sum of Three Hundred Thousand (\$300,000.00) Dollars, by reason of sustained damage to Plaintiff's reputation as an automobile dealer;

5. For costs of suit incurred herein; and,

6. For such other and further relief as to the Court seems meet and proper in the premises.

SPRAY, GOULD & BOWERS,

By /s/ CHARLES P. GOULD,

Attorneys for Plaintiff.

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 5, 1956.

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO ANSWER WITH RESPECT TO COMPLAINT AND AMENDED COMPLAINT WHEN SERVED AND FILED

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the defendant shall have twenty additional days from the date hereof to answer or otherwise plead to the complaint now on file herein.

This extension of time is given because the plaintiff has not yet served and filed the amended complaint which plaintiff was given permission to do so

by stipulation of the parties herein dated March 14, 1956. When such amended complaint is filed, defendant's time to answer such amended complaint or otherwise plead with respect thereto shall extend through twenty days from the service on defendant's counsel of such amended complaint. If service is made by mail, two additional days will be granted so that defendant will have in all twenty-two days.

Dated: April 6, 1956.

McCUTCHEN, BLACK, HARN-
AGEL & GREENE,
G. WILLIAM SHEA,
PHILIP K. VERLEGER,
JACK T. SWAFFORD,

By /s/ JACK T. SWAFFORD,
Attorneys for Defendant.

SPRAY, GOULD & BOWERS,
CHARLES P. GOULD,

By /s/ ROBERT E. FORD,
Attorneys for Plaintiff.

It Is So Ordered this 6th day of April, 1956.

/s/ ERNEST A. TOLIN,
Judge.

[Endorsed]: Filed April 6, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION UNDER RULE 12 FEDERAL RULES OF CIVIL PROCEDURE FOR A DISMISSAL OF THE AMENDED COMPLAINT HEREIN FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

To the Above Named Plaintiff and Spray, Gould & Bowers, Its Counsel:

You will please take notice that defendant Chrysler Corporation will move this Court in Courtroom 6 of the United States Post Office and Courthouse Building, 312 North Spring Street, in the City of Los Angeles, State of California, on May 7, 1956, at 10 o'clock a.m., or as soon thereafter as counsel can be heard, as follows:

1. For dismissal of the amended complaint herein under Rule 12(b)(6) of the Federal Rules of Civil Procedure because it fails to state a claim against defendant upon which relief can be granted.

Said motion will be based upon the amended complaint herein, this notice of motion and the memorandum of points and authorities attached hereto and filed herewith.

Dated: April 26, 1956.

McCUTCHEN, BLACK, HARN-
AGEL & GREENE,
G. WILLIAM SHEA,

PHILIP K. VERLEGER,
JACK T. SWAFFORD,

By /s/ G. WILLIAM SHEA,
Attorneys for Defendant,
Chrysler Corporation.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 27, 1956.

United States District Court for the Southern
District of California, Central Division

No. 18,518-T

RENNIE & LAUGHLIN, INC., a California Corporation,

Plaintiff,

vs.

CHRYSLER CORPORATION, a Delaware Corporation,

Defendant.

ORDER SUSTAINING MOTION TO DISMISS
AMENDED COMPLAINT FOR FAILURE
TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendant's motion under Rule 12 of the Federal Rules of Civil Procedure for a dismissal of the amended complaint herein for failure to state a claim upon which relief can be granted having come on for hearing on May 7, 1956, before the

Honorable Ernest A. Tolin, in Courtroom 6 of the United States Post Office and Courthouse Building, and the Court, having reviewed said motion and 312 North Spring Street, Los Angeles, California, and the Court, having reviewed said motion and supporting papers and plaintiff's memorandum of points and authorities in opposition to said motion and having heard the arguments of counsel for the respective parties, and said motion having been taken under submission by the Court,

It Is Hereby Ordered, Adjudged and Decreed that the amended complaint fails to state a claim upon which relief can be granted and that the amended complaint and this action be and they are hereby dismissed.

Dated: May 11, 1956.

/s/ ERNEST A. TOLIN,
United States District Judge.

Approved as to form:

SPRAY, GOULD & BOWERS,
By /s/ C. W. BOWERS,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 14, 1956.

Docketed and entered May 15, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Rennie & Laughlin, Inc., plaintiff above named hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Sustaining Motion to Dismiss Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted entered in this action on the 15th day of May, 1956.

Dated June 12th, 1956.

SPRAY, GOULD & BOWERS,

By /s/ CHARLES P. GOULD,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men My These Presents, that Fidelity and Deposit Company of Maryland, a corporation, organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto the Defendant in the above case, in the penal sum of Two Hundred Fifty and No/100 Dollars (\$250.00), to be paid to said Defendant, its successors, assigns or legal representatives, for which payment well and truly to be made, the Fidelity and

Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

The Condition of the Above Obligation Is Such, That Whereas, Rennie & Laughlin, Inc., a California Corporation, is about to take an appeal to the United States Court of Appeals for the Ninth Circuit from that judgment heretofore entered in this action May 15, 1956.

Now, Therefore, if the above-named appellant shall prosecute said appeal to effect and answer all costs which may be adjudged against it if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed By the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them or either of them, in accordance with their obligation and award execution thereon.

Signed, Sealed and Dated this 11th day of June, 1956.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND,

By /s/ CARL HANNEMANN,
Attorney in Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ CHARLES P. GOULD.

Approved this 13th day of June, 1956.

/s/ M. E. THOMPSON,
Deputy.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 90, inclusive, contain the original

Complaint;

Stipulation Extending Time for Defendant to Answer;

Notice of Motion for a Dismissal of the Complaint, etc.;

Stipulation re: Continuance of Motion;

Stipulation re: Withdrawal of motion to dismiss and alternative motion, filing amended complaint, and time within which answer or other pleading to the complaint shall be filed;

Amended complaint;

Stipulation extending time to answer with

respect to complaint and amended complaint when serviced and filed;

Notice of Motion for a dismissal of the amended complaint herein for failure to state a claim upon which relief can be granted;

Order sustaining motion to dismiss amended complaint for failure to state a claim upon which relief can be granted;

Notice of appeal;

Designation of Contents of record on appeal;

which, together with a full, true and correct photo-static copy of cost bond on appeal, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 17th day of July, 1956.

[Seal]

JOHN A. CHILDRESS,
Clerk,

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15210. United States Court of Appeals for the Ninth Circuit. Rennie & Laughlin, Inc., a Corporation, Appellant, vs. Chrysler Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 18, 1956.

July 25, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15210

RENNIE & LAUGHLIN, INC., a California Corporation,

Appellant,

vs.

CHRYSLER CORPORATION, a Delaware Corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS
(Rule 17) (6)

Now comes the Appellant, Rennie & Laughlin, Inc., and states that the following points will be relied upon by Appellant in its appeal of the above-entitled matter:

1. The Court erred in granting motion for dismissal of the amended complaint for failure to state a claim upon which relief can be granted.

2. The amended complaint stated facts sufficient to constitute a cause of action.

Dated July 25th, 1956.

SPRAY, GOULD & BOWERS,

By /s/ CHARLES P. GOULD,

Attorneys for Appellant.

Affidavit of mailing attached.

[Endorsed]: Filed July 27, 1956.



No. 15210

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RENNIE & LAUGHLIN, INC., a Corporation,

Appellant,

vs.

CHRYSLER CORPORATION,

Appellee.

APPELLANT'S OPENING BRIEF.

SPRAY, GOULD & BOWERS,

By CHARLES P. GOULD,

1671 Wilshire Boulevard,
Los Angeles 17, California,

Attorneys for Appellant.

FILE

NOV 15 1956

PAUL E. O'BRIEN, CLERK



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No. 15210
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RENNIE & LAUGHLIN, INC., a Corporation,
Appellant,
vs.
CHRYSLER CORPORATION,
Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal by plaintiff from an order dismissing its amended complaint and its action against defendant on the ground that the complaint failed to state a claim upon which relief could be granted. The order was made by the United States District Court for the Southern District of California, Central Division (Judge Tolin) in an action for breach of contract.

Jurisdiction.

The appealed order was made on May 11, 1956 and was entered May 15, 1956 [R. 71]; Notice of Appeal was given on June 12, 1956 [R. 72].

Original jurisdiction was conferred on the District Court by 28 U. S. C. 1332 by reason of the facts that the amended complaint alleged that the parties were citizens of different states [R. 61], and the amount in controversy exceeded \$3000.00 [R. 66]. Jurisdiction to review the judgment is conferred on this Court by 28 U. S. C. 1291.

Statement of Case.

On August 8, 1955, appellant filed a complaint for breach of contract against Chrysler Corporation [R. 3 *et seq.*]. Chrysler subsequently noticed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, or for a more definite statement [R. 55]. By stipulation, the motion was withdrawn [R. 59] and appellant filed an amended complaint [R. 61] attaching thereto the exhibits set forth in the Transcript of Record at pages 9 *et seq.* and 33 *et seq.*

Chrysler again moved to dismiss the complaint for failure to state a claim upon which relief can be granted [R. 69]. It is from the order dismissing the amended complaint that this appeal is taken.

The Amended Complaint.

In its amended complaint, appellant alleged that on December 12, 1949, it entered into a contract with defendant Chrysler Corporation whereby it became a dealer in DeSoto and Plymouth motor vehicles [Par. III, IV and V, R. 61-62]. In the month of July, 1951, appellants' president and active manager suffered a heart attack which prevented him from working [Par. VII, R. 62]. Due to this fact and the fact that the business had been losing money, in September of 1951, appellant advised Chrysler of its desire to sell the business, and Chrysler, through its agents, volunteered to find a purchaser acceptable to both parties [Par. VIII, R. 63]. Chrysler thereafter referred certain prospective buyers to appellant and negotiations were commenced on October 1, 1951 [Par. IX, R. 63]. On October 26, 1951, all terms of the transfer to the persons recommended by Chrysler were complete and it was agreed that a formal contract

would be executed and the price paid on the next day [Par. X, R. 63]. Prior to the execution of the contract, however, Chrysler informed the buyers that it had revoked its consent to the transfer and they, therefore, refused to complete the sale. Chrysler later advised appellant that it had withdrawn its consent in order to reduce the number of dealers in the area [Par. XI and XII, R. 64].

Thereafter, appellant was forced to turn over the operation of its business to the prospective purchasers who operated it until March 31, 1954, when appellant was forced to discontinue business because of losses amounting to \$102,686.64. In addition to this loss, appellant lost the agreed price of the business, \$77,921.69, and its reputation as an automobile dealer was irreparably damaged [Par. XIV to XIX, R. 64-66].

Specification of Error.

The District Court erred in dismissing the amended complaint and the action for failure to state a claim upon which relief can be granted.

Summary of Argument.

POINT I.

**THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF
CAN BE GRANTED.**

(a) Consent to the proposed assignment was given.

(b) Consent to the proposed assignment was wrongfully revoked.

POINT II.

**THE COMPLAINT STATES A CLAIM SUFFICIENT AGAINST
A MOTION TO DISMISS.**

ARGUMENT.

POINT I.

The Complaint States a Claim Upon Which Relief Can Be Granted.

(a) Consent to the proposed assignment was given.

Since this is an appeal arising from the granting of a motion to dismiss, all facts well pleaded in the amended complaint must be taken as true. (*Karseal Corporation v. Richfield Oil Corporation*, 9 Cir., 1955, 221 F. 2d 358.

The contract [Ex. A] between appellant and Chrysler contemplated the possibility that a dealer might want to assign his rights under it. Paragraph 7 thereof states in part:

“Accordingly it is agreed that this agreement shall terminate immediately by its own force without notice from either party in the event of (1) an attempted assignment of this agreement by Direct Dealer without DeSoto’s written consent; . . .” [R. 19].

When appellant, for health and financial reasons, found it necessary to sell its business, it so advised Chrysler, and Chrysler thereafter actively procured the prospective purchasers for the business. The requirement of written consent to the assignment was obviously for the protection of Chrysler; its action in recommending the assignees waived this requirement. As the Court said in *Gilmore v. Hoffman*, 123 Cal. App. 2d 313, 266 P. 2d 833, 837:

“Their actual knowledge was equivalent to notice, particularly where, as here, they acted upon the oral notice and thoroughly understood the situation, were not relying on any such written notice, and apparently waived it. A provision in a contract pertaining to written notice may be waived, either expressly or by conduct, by the party for whose benefit it is inserted. *Daly vs. Ruddell*, 137 Cal. 671, 70 Pac. 784.”

See also:

Continental Casualty Co. v. Schaefer, 9 Cir., 1949,
173 F. 2d 5;

Power Service Corp. v. Joslin, 9 Cir., 1949, 175
F. 2d 698.

(b) Consent to the proposed assignment was wrongfully revoked.

Chrysler, of course, was under no duty to consent to appellant's proposed assignment, but having consented and having procured acceptable assignees, it could not then revoke its consent, at least for reasons not related to the contract. Having consented, Chrysler impliedly promised that it would do nothing to prevent appellant's making the assignment, because from the nature of the promise and the circumstances under which it was made it is apparent that the parties must have proceeded on the basis that the consent would not be revoked and, therefore, that condition is implied in the contract.

Baldwin Rubber Co. v. Paine & Williams Co.,
6 Cir., 1939, 107 F. 2d 350;

Sacramento Navigation Co. v. Salz, 273 U. S.
326.

Chrysler did not revoke its consent to the assignment for reasons related to the contract; J. B. Wagstaff, the General Sales Manager for DeSoto Division who executed the contract, admitted that the sale had been approved, but that later it was decided to revoke the consent in the hope that the number of dealers in the area would be reduced [R. 64]. Chrysler thereby used its knowledge of appellant's physical and financial condition to further its own purposes to appellant's detriment.

POINT II.

The Complaint States a Claim Sufficient Against a Motion to Dismiss.

The complaint sets forth a contract between the parties; that one of the provisions of the contract required the written consent of Chrysler to an assignment; that consent was obtained, the requirement of a writing having been waived by Chrysler; that the consent was wrongfully revoked, and that appellant was damaged thereby. Appellant could have pleaded many more facts, but not without doing violence to the Federal Rules of Civil Procedure.

“Rule 8 restricts pleading to a short and plain statement of (1) the grounds for the court’s jurisdiction, (2) a similar statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief for which he deems himself entitled.”

Sidebotham v. Robison, 9 Cir., 1954, 216 F. 2d 816, 826.

In *Gruen Watch Co. v. Artists Alliance*, 191 F. 2d 700, at page 705, this Court said in reversing a judgment entered on an order dismissing a complaint on the ground that it failed to state a claim on which relief could be granted:

“On occasion motions to dismiss supply a useful technique for the prompt disposition of suits, and the Federal Rules of Civil Procedure which permit judgment on the pleadings are useful indeed. But it must be borne in mind that in many a suit such a motion cannot take the place of submission of evidence and of findings of fact and conclusions of law. Every motion to dismiss must be viewed in the light of Rule 8 (a), (e) and (f), Fed. Rules Civ. Proc.

28 U. S. C. A. Such a motion should not be granted unless it appears clearly that no cause of action is stated. The court below was not concerned with the question as to whether Gruen had a claim on which it is ultimately entitled to prevail but whether the second amended and supplemental complaint, construed in the light most favorable to Gruen, and with all doubts resolved in favor of the complaint's sufficiency, *stated* a claim on which relief could be granted."

Conclusion.

For the foregoing reasons, it is respectfully submitted that the complaint does state a claim on which relief can be granted, and that, therefore, the judgment dismissing it should be reversed.

Respectfully submitted,

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No. 15210

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RENNIE & LAUGHLIN, INC., a Corporation,

Appellant,

vs.

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Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Designation of Parties.

In this brief the parties will be referred to as they appeared in the District Court. Appellant was plaintiff below and appellee was defendant.

Jurisdiction.

Defendant accepts plaintiff's statement of the pleadings and facts disclosing that the District Court had jurisdiction and that this Court has jurisdiction to review the judgment in question.

Statement of the Case.

Plaintiff has divided its statement of the case into two parts: (1) the procedural history, entitled "Statement of Case", and (2) a summary of the allegations of the amended complaint, entitled "The Amended Complaint". Defendant accepts plaintiff's statement of the procedural history of the case, except it should be pointed out that the

order appealed from dismissed both the amended complaint and the action. Although defendant does not controvert plaintiff's summary of the amended complaint, defendant is of the view that it is incomplete in that it does not contain all of the allegations which are pertinent in supporting defendant's position that the amended complaint fails to state a claim upon which relief can be granted. Defendant summarizes immediately below those allegations of the amended complaint which it deems necessary to a proper understanding and disposition of the appeal.

All references are to the amended complaint at pages 61 through 67 of the Record and to Exhibits A and B attached to the amended complaint. Exhibit A is at pages 9 to 33 of the Record, and Exhibit B is at pages 33 to 53 of the Record.

In December, 1949, plaintiff and the De Soto Division of defendant entered into a written agreement whereby plaintiff acquired a non-exclusive right to purchase De Soto and Plymouth motor vehicles. (Paragraph III and Exhibit A.) The agreement, Exhibit A, provided that "this agreement shall terminate immediately by its own force without notice from either party in the event of . . . an attempted assignment of this agreement by Direct Dealer without De Soto's written consent". (Paragraph 7 of Exhibit A.) Plaintiff, for a number of reasons, "advised Defendant . . . of its desire to sell its business." (Paragraphs VII and VIII.) Defendant advised plaintiff that it would secure a buyer for plaintiff that was "acceptable" to defendant. (Paragraph VIII.) Thereafter, certain prospective buyers were referred by defendant to plaintiff. (Paragraph IX.) Plaintiff and said prospective buyers reached an oral understanding on the sale of "Plaintiff's business," and arrangements

were made to execute a "formal contract of sale". (Paragraph X.) Before a formal contract of sale was executed, defendant informed said prospective buyers that defendant "had revoked its consent to the sale". (Paragraph XI.) Also before a formal contract of sale was executed, defendant told plaintiff that defendant "had decided to revoke its consent in order to decrease the number of dealers in the area". (Paragraph XII.) The prospective purchasers refused to complete the sale after notification by defendant that it had revoked its consent. (Paragraph XI.) Plaintiff then entered into a management contract with the prospective purchasers whereby plaintiff turned over to them its entire business on a management basis. (Paragraph XIV.)

Subsequently, in 1952, plaintiff and defendant executed another written agreement under which or by which plaintiff continued to act as an automobile dealer for the De Soto Division of defendant. (Paragraph VI and Exhibit B.) Said 1952 agreement superseded and cancelled the 1949 agreement. (Paragraph 29 of Exhibit B.) The 1952 agreement provided that "Direct Dealer may not assign this agreement without the written consent of De Soto, executed by the President, Vice-President or General Sales Manager of De Soto." (Paragraph 29 of Exhibit B.) The 1952 agreement also provided that the agreement terminated "upon an attempted assignment of this agreement by Direct Dealer". (Paragraph 8 of Exhibit B.)

Plaintiff's losses continued during the management period and plaintiff closed its "business" and "discontinued operating as a direct dealer for Defendant" on March 31, 1954. (Paragraphs XV and XVIII.) Plaintiff was damaged in that it did not receive the price for the sale of its business to the prospective purchasers (Paragraph

XVII); it sustained additional operating losses after the revocation of consent to the proposed assignment (Paragraph XVIII); and its reputation was irreparably damaged by reason of defendant's refusal to permit the "sale of said business of Plaintiff" (Paragraph XIX).

Summary of Argument.

The District Court properly made an order dismissing the amended complaint and the action and this Court should affirm that order for the reason that the amended complaint fails to state a claim upon which relief can be granted. Defendant's argument on this appeal is based upon the following points:

I.

The Amended Complaint and the Action Were Properly Dismissed Under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

II.

The Amended Complaint Does Not Allege a Breach of Any Contractual Obligation of the Defendant Under the 1949 Agreement (Exhibit A to the Amended Complaint).

III.

The Amended Complaint Does Not Allege a Breach of Any Contractual Obligation of the Defendant Under the 1952 Agreement (Exhibit B to the Amended Complaint).

IV.

Plaintiff's Argument on This Appeal Basically Is an Attempt to Invoke the Principle of Promissory Estoppel, Which Can Not Be Applied to the Facts Pleaded by Plaintiff.

V.

The Defects in the Amended Complaint Could Not Be Cured by Pleading Additional Facts.

I.

The Amended Complaint and the Action Were Properly Dismissed Under F. R. C. P. 12(b)(6).

This case is one of those situations for which Rule 12(b)(6) of the Federal Rules of Civil Procedure is designed. An examination of the amended complaint can leave no doubt that plaintiff has failed to state a claim upon which relief can be granted, and that plaintiff cannot allege a breach of a contractual obligation by defendant.

The rule is clear that, where a complaint is without any merit and where the plaintiff could not possibly prove a case under the allegations of the complaint, the defendant should be protected by an early dismissal of the action rather than being put to the trouble and expense of answering a fatally defective complaint.

See,

De Loach v. Crowley's, Inc. (C.C.A. 5th 1942),
128 F. 2d 378, 380;

2 MOORE'S FEDERAL PRACTICE.

1208, and 1955 Cumulative Supplement thereto, commencing at page 150.

II.

The Amended Complaint Does Not Allege a Breach of Any Contractual Obligation of the Defendant Under the 1949 Agreement (Exhibit A to the Amended Complaint).

It is defendant's primary position that plaintiff has not alleged the breach by defendant of any enforceable contractual obligation. The allegation in Paragraph XIII of the amended complaint respecting the 1949 agreement does not constitute a sufficient allegation. It alleges only:

"That having consented to the aforesaid sale to said purchasers, Defendant's subsequent revocation of said consent constituted a breach of said sales contract annexed hereto as Exhibit A." (Paragraph XIII; R. 64.)

That allegation is a conclusion of law; it is not admitted by a motion to dismiss for failure to state a claim. Such a motion admits only allegations of fact which are material and relevant; it does not admit arguments, inferences or legal conclusions.

Flanigan v. Security-First Nat. Bank (D.C., S.D. Cal., 1941), 41 F. Supp. 77, 79;

Huntley v. Gunn Furniture Co. (D.C., W.D. Mich., 1948), 79 F. Supp. 110, 111.

Plaintiff has pleaded the 1949 contract between the parties by attaching a copy as Exhibit A to the amended complaint. Accordingly, it is a part of the amended complaint for all purposes. (Rule 10[c], Federal Rules of Civil Procedure.) Therefore, the rule stated in

Zeligson v. Hartman-Blair, Inc. (C.C.A. 10th, 1942), 126 F. 2d 595,

is particularly applicable:

“The motion to dismiss admitted all facts well pleaded, but it did not admit the legal effect ascribed by the pleader to the writing. The writing was attached to the first amended complaint as an exhibit and its legal effect is to be determined by its terms rather than by the allegations of the pleader.” (Page 597.)

And, in

Johnson v. Igleheart Bros. (C.C.A. 7th, 1938), 95 F. 2d 4,

the defendant demurred to a complaint for breach of contract. The court affirmed a judgment sustaining the demurrer, saying:

“Concerning the effect of the demurrer, it seems to be the position of plaintiff that the defendant, by making such attack upon the complaint, admits the allegations thereof, or at any rate, such allegations as are well pleaded. Generally, of course, that is the case, but it seems where an action is based upon a written contract, a copy of which is attached to the complaint, a somewhat different effect is had, or perhaps it would be more accurate to say that the court must look to the contract in determining what allegations of the complaint are properly pleaded.” (Page 7.)

To the same effect see:

St. Louis, K. & S. E. R. Co. v. United States, 267 U. S. 346, 45 S. Ct. 245 (1925).

Plaintiff consistently has characterized this action as one for damages for breach of contract. But nowhere

in the amended complaint has plaintiff specified with any particularity the contractual obligation which it is claimed defendant breached. To prevail on the amended complaint, plaintiff must well plead the breach of an agreement which placed upon defendant a binding obligation to consent affirmatively to an assignment by plaintiff of its rights under the agreement. Plaintiff did not do this.

It is appropriate at this point to dissipate the confusion which is inherent in plaintiff's misleading reference in the amended complaint to a sale of "its business", rather than to a sale by way of an assignment of rights arising out of a written contract. It is the latter limited type of property right which, under the facts alleged, is involved. The ownership and management of plaintiff's other property was not affected by any agreement. There is nothing in the 1949 agreement which prevented plaintiff from selling its other assets at any time, for any price it chose, or to whomsoever it pleased, whether or not defendant consented to such a sale.

The 1949 agreement is free from all ambiguity upon the basic question whether defendant was obligated under any circumstances to consent affirmatively to an assignment of the contract by plaintiff. There is nothing in that agreement which placed such an obligation upon defendant. On the contrary, the existence of such an obligation was emphatically denied by the term therein providing that any attempted assignment by plaintiff without defendant's written consent terminated the agreement. (Paragraph 7; R. 19.) Such a provision is the very antithesis of the right now claimed by plaintiff. It created a duty in plaintiff not to assign without defendant's written consent, and it created a right in defendant to give or to withhold consent to a proposed assignment.

Plaintiff itself seems to concede this fact by admitting, on page 5 of its opening brief, that "Chrysler, of course, was under no duty to consent to appellant's proposed assignment"

Defendant is, however, somewhat puzzled by the paragraph on page 5 of plaintiff's brief which contains the statement that defendant "impliedly promised that it would do nothing to prevent appellant's making the assignment" Manifestly plaintiff cannot properly maintain that the 1949 agreement contained any such implied promise or condition. Such a promise flies in the teeth of paragraph 7 of that agreement. It requires no citation of authority for the axiomatic principle that conditions and promises may not be read into a contract by implication when to do so is inconsistent with the express provisions contained in the agreement. The cases cited by plaintiff,

Baldwin Rubber Co. v. Paine & Williams Co.,
(C.C.A. 6th, 1939), 107 F. 2d 350,

and

Sacramento Navigation Company v. Salz, 273
U. S. 326, 47 S. Ct. 368, 71 L. Ed. 663 (1927),

are entirely consistent with this position in that in both cases the courts recognized that conditions and promises could be implied only for the purpose of effectuating the intention of the parties as it appears from the language of the contract and the circumstances under which it was made.

Nor can plaintiff rely on those allegations upon which plaintiff bases its conclusion of "waiver" to support a claim that it has adequately alleged the breach of an enforceable promise by defendant.

The short and basic answer to plaintiff's tender of waiver as a theory for recovery is that waiver may not be invoked to create an enforceable obligation where none existed before. It is "defensive" in nature. The doctrine is limited to defeating a cause of action or to eliminating a defensive claim interposed by a defendant.

Professor Williston makes this extremely pertinent statement concerning waiver:

"The law is clear that in any case where a party to a contract agrees to give up a possible further defense or foregoes the advantage of a condition provided for his benefit in an existing contract, the promise is binding if the promisee relying thereon changes his position. In these cases, however, no new right is created. The court does not sustain an action on the promise; it reaches the desired result by allowing a defense to an action or allowing an original right to be enforced by merely prohibiting the interposition of a defense. They properly fall under the head of waiver, giving that word the narrow significance hereafter ascribed to it."

(I WILLISTON ON CONTRACTS, [1936 Rev. Ed.], §139, pp. 497-498.)

Professor Williston expressly recognizes that the doctrine of waiver is firmly rooted in estoppel.

III WILLISTON ON CONTRACTS, *supra*, §691, p. 1995, §692, p. 1995.

The editors of California Jurisprudence, 2d, in a statement concerning the objective of estoppel make it clear that Professor Williston's comments pertaining to waiver are merely an application of the principles of estoppel:

"The object of the doctrine [of estoppel] is protective, and it is limited to saving harmless or making

whole the person in whose favor it arises. . . . Estoppel is applied defensively, and operates to prevent a person from taking unfair advantage of another, not to give an unfair advantage. It is always so applied as to promote the ends of justice, being available only for protection, not as a weapon of assault; and in the nature of things its application depends on the particular facts of each case.” (18 Cal. Jur. 2d, Estoppel, §3, p. 405.)

In this case, therefore, waiver might be a proper issue if (1) there had been an assignment of plaintiff's rights under the agreement prior to withdrawal of the consent to assignment, (2) the assignee had brought this action for some breach of the 1949 agreement, and (3) defendant had interposed the defense that the assignee could not maintain the action in that there was no valid assignment because no written consent had been obtained from defendant. Such assignee might then claim that defendant had waived that condition of the agreement. Manifestly that situation bears no resemblance to the case before this court. This action was not brought by any assignee.

All of the cases cited by plaintiff in support of its theory of waiver in part (a) of its Point I are consistent with this analysis of waiver. In

Gilmore v. Hoffman, 123 Cal. App. 2d 313, 266 Pac. 2d 833 (1954);

Daly v. Ruddell, 137 Cal. 671, 70 Pac. 784 (1902);
and

Continental Casualty Co. v. Schaefer (C. A. 9th, 1949), 173 F. 2d 5,

the courts invoked the principle of waiver only for the limited purpose of disposing of a defense asserted by the

defendant. In none did the court use the doctrine as a basis for constructing an obligation as to which plaintiff was permitted to recover damages for the breach thereof.

The case of

Power Service Corporation v. Joslin (C.A. 9th, 1949), 175 F. 2d 698,

is of even less comfort or assistance to plaintiff for there the court applied the doctrine of waiver so as to defeat plaintiff's theory of recovery.

III.

The Amended Complaint Does Not Allege a Breach of Any Contractual Obligation of the Defendant Under the 1952 Agreement (Exhibit B to the Amended Complaint).

The 1952 agreement, Exhibit B to the amended complaint, has no proper place in this action. The sole reference to it in the amended complaint is the allegation in Paragraph VI that it was executed on February 20, 1952. (R. 62.) Plaintiff makes no mention of the agreement in its brief. Plaintiff's failure to refer to this agreement no doubt is forced upon it by the fact that it was not executed until several months after the occurrence of the events upon which plaintiff now seeks to predicate a cause of action for breach of contract.

IV.

Plaintiff's Argument on This Appeal Basically Is an Attempt to Invoke the Principle of Promissory Estoppel, Which Cannot Be Applied to the Facts Pleaded by Plaintiff.

Plaintiff's attempt to raise the question of waiver appears to be a misdirected effort to invoke the principle of promissory estoppel. Plaintiff, in its brief, appears to rely upon some implied promise that defendant promised to give written consent to the assignment, or that defendant promised not to do anything "to prevent appellant's making the assignment". But plaintiff has failed to allege facts showing that there was any consideration for such a promise. The amended complaint fails even to show a reasonable basis for invoking the principle of promissory estoppel. Those facts which are alleged affirmatively disclose that there was no consideration for any such promise, either conventional or arising from the application of promissory estoppel.

Section 90 of the Restatement of Contracts succinctly sets forth the promissory estoppel theory of consideration:

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee *and which does induce such action or forbearance* is binding if injustice can be avoided only by enforcement of the promise." (Italics added.)

Promissory estoppel, of course, springs from the equitable estoppel doctrine which is appropriately stated by the following language quoted with approval in

Carpy v. Dowdell, 115 Cal. 677, 687, 47 Pac. 695 (1897),

and

Wade v. Markwell & Co., 118 Cal. App. 2d 410, 420, 258 Pac. 2d 497 (1953):

“The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.” (115 Cal. at p. 687, 47 Pac. at p. 697; 118 Cal. App. 2d at p. 420, 258 Pac. 2d at p. 502.)

The amended complaint discloses affirmatively and quite clearly that plaintiff did not rely upon any promise of defendants and that plaintiff did not incur any detriment by reason of any such reliance. There can be no dissent from the statement that no promise on the part of defendant induced any action on the part of plaintiff which was of such a definite and substantial character as to require enforcement of the promise. The plain fact, alleged in the amended complaint, is that plaintiff did nothing in reliance upon any promise or representation made by defendant. At the time that consent was withdrawn plaintiff had not changed its position in any material respect whatsoever. Indeed, if plaintiff, in the face of notice of withdrawal of consent, had gone ahead and assigned the contract, it could not now claim that such

action was either justifiable or in reliance upon the original oral consent.

There is a further reason why plaintiff could not justifiably have relied upon any alleged oral promise to give written consent or to avoid doing anything to prevent plaintiff from making the assignment. It is this: Plaintiff alleges that a regional manager of defendant, one A. H. Langridge, gave the oral consent to the proposed assignment. The 1949 agreement, Exhibit A to the amended complaint, provides:

“No representative of either party except as herein explicitly provided has any authority to waive any of the provisions of this agreement or to modify or change any of its terms . . .” (Paragraph 12 of Exhibit A; R. 25.)

That agreement does not provide “explicitly” or otherwise that either A. H. Langridge or a regional manager had authority to waive, modify or change the requirement of written consent to an assignment by plaintiff of its rights under the agreement. Plaintiff, therefore, was upon clear notice that any purported oral consent by the said A. H. Langridge would be ineffectual as a promise to give written consent or as a promise to avoid doing anything to prevent plaintiff from making the assignment. Any reliance, which, as stated, did not occur, upon the representations of the said A. H. Langridge, would have been entirely without justification.

V.

The Defects in the Amended Complaint Could Not Be Cured by Pleading Additional Facts.

Although plaintiff has divided its argument into two major "points," it is readily apparent that each point is addressed to the same claimed error. The only new thought introduced in plaintiff's "Point II" is the statement that it could have pleaded "many more facts." Plaintiff could not, however, consistent with the allegations in the amended complaint, have pleaded any additional facts which would show the breach of an obligation to permit the proposed assignment or to give written consent thereto. In all events plaintiff would remain confronted with the two obstacles previously discussed: (1) any such promise is in direct and irreconcilable conflict with the provisions of the 1949 agreement, and (2) any such promise is not supported by consideration, whether on the theory of promissory estoppel or otherwise.

VI.

Conclusion.

Plaintiff has not pleaded the breach of any contractual obligation imposed on defendant by the 1949 agreement, or the 1952 agreement, or otherwise. It has not alleged a promise which defendant was bound to perform and which it did not perform to plaintiff's damage.

The doctrine of waiver upon which plaintiff appears to base its argument is completely inapplicable here because that doctrine is never applied to create an enforceable contractual right. It is defensive only, operating to defeat a *prima facie* case made by a plaintiff, or to set aside a defense interposed by a defendant, thus clearing the way for a plaintiff to proceed upon his basic cause of action.

Plaintiff has not pleaded facts which bring the case within the principle of promissory estoppel. On the contrary, plaintiff's allegations disclose affirmatively that the principle cannot be used by plaintiff since the plaintiff did not rely or act to its detriment upon any representation or promise made by defendant.

In summary, plaintiff has not pleaded and cannot plead a cause of action for breach of any contract pleaded in the amended complaint. The amended complaint fails completely to state a claim upon which relief can be granted and discloses affirmatively that plaintiff has no claim. The District Court, therefore, properly made an order dismissing the amended complaint and the action, and this Court should affirm that judgment.

Respectfully submitted,

G. WILLIAM SHEA,

JACK T. SWAFFORD,

MCCUTCHEN, BLACK, HARNAGEL & GREENE,

Attorneys for Appellee.

Date: December 14, 1956.

No. 15210

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RENNIE & LAUGHLIN, INC., a Corporation,

Appellant,

vs.

CHRYSLER CORPORATION, a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

SPRAY, GOULD & BOWERS,
1671 Wilshire Boulevard,
Los Angeles 17, California,
Attorneys for Appellant.

FILED

DEC 31 1956

PAUL P. O'BRIEN, CLERK

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No. 15210

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RENNIE & LAUGHLIN, INC., a Corporation,

Appellant,

vs.

CHRYSLER CORPORATION, a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

Introduction.

In this Brief, plaintiff will reply to defendant's arguments in the order in which they appear in Appellee's Brief.

I.

The District Court Was in Error in Dismissing the Amended Complaint and the Action.

This is not a proper case for the application of Rule 12(b)(6) of the Federal Rules of Civil Procedure. In the case cited by defendant, *DeLoach v. Crowley's, Inc.* (5 Cir. 1942), 128 F. 2d 378, the court reversed a judgment dismissing the complaint, stating at page 380:

"Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which

the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings. Demurrers are abolished. A petition may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim. But the principle is no longer of force that the pleadings will be construed strictly against the pleader. Rule 8(f) says that 'all pleadings shall be so construed as to do substantial justice.' "

and in *Continental Collieries v. Shober* (3 Cir. 1942), 130 F. 2d 631, the court in reversing the judgment dismissing the complaint stated at page 635:

"... there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim. . . . No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it."

Plaintiff has alleged in his complaint a breach of a contractual duty by defendant and is entitled to a trial on the merits of the case.

II.

The Amended Complaint Alleges a Breach of Contract.

In its amended complaint, plaintiff has clearly alleged a breach by defendant of the 1949 agreement [Ex. A]. It is plaintiff's contention that when defendant consented to the assignment of the contract it became obligated to render performance to the assignee, and that its subsequent

indication that it would refuse performance to the assignee by stating to plaintiff and the assignee that it had revoked its consent to the assignment constituted a breach of the contract. It is obvious that when defendant required plaintiff to obtain its consent to an assignment of the contract, it also promised that if the consent were obtained it would render performance to the assignee under the terms of the contract. Any other construction would render the requirement of obtaining defendant's consent meaningless. It would be futile to require plaintiff to obtain defendant's consent, but leave defendant in the position of being able, after it had given its consent, to then determine whether it wanted to perform under the contract or not.

Admittedly, defendant did not expressly promise in the 1949 agreement to render performance to an assignee of the contract, but such a promise is implicit in the contract. As Judge Cardozo said in a leading case of *Wood v. Lucy, Lady Duff-Gordon*, 222 N. Y. 88, 118 N. E. 214:

“We think, however, that such a promise is fairly to be implied. The law has out-grown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be, ‘instinct with an obligation,’ imperfectly expressed. (Scott, J., in *McCall Co. v. Wright*, 133 App. Div. 62, 117 N. Y. S. 775; *Moran v. Standard Oil Company*, 211 N. Y. 187, 198, 105 N. E. 217.)”

The Civil Code of California provides in respect to the interpretation of contracts as follows:

§1655. *Reasonable stipulations, when implied.* Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in re-

spect to matters concerning which the contract manifests no contrary intention.

§1656. *Necessary incidents implied.* All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.

See also:

United States v. Outer Harbor Dock & Wharf Company (D. C. S. D. Cal. 1954), 124 Fed. Supp. 337.

Defendant is attempting to confuse the issues when it states in the first paragraph on page 8 of its brief that plaintiff must plead that defendant had an obligation to consent to the assignment. Defendant was under no obligation to do so, and plaintiff freely admitted that fact on page 5 of its brief. Plaintiff does contend that once having consented to the assignment, defendant was then obligated to render performance to the assignee and could not revoke its consent without breaching the agreement.

Nor does plaintiff seek any affirmative rights under a theory of waiver as contended on page 10 of defendant's brief. Plaintiff raises the theory of waiver, in the words of defendant, to eliminate "a defensive claim interposed by a defendant." In other words, plaintiff contends that the defendant cannot defeat plaintiff's claim by showing that the contract required defendant's consent to an assignment to be in writing, because by its actions in actively procuring the assignees, it had waived the requirement of written

consent. Plaintiff, therefore, is invoking the principle of waiver for exactly that purpose for which defendant contends it can be invoked.

That defendant's contention in the second paragraph of page 8 in its brief that the assignment of the 1949 agreement and plaintiff's sale of its business were unrelated, is completely unrealistic. The sale of a dealership for Chrysler products, even though it may include a lease, equipment or other property, without the transfer of a distributorship agreement with Chrysler, is as barren as playing "*Hamlet* without Hamlet."

III.

Reply to Appellee's Point III.

Plaintiff has never contended that it is basing any of its rights in this suit on the 1952 agreement.

IV.

Promissory Estoppel Can Be Applied to This Case.

Plaintiff does not rest its case solely on the principle of promissory estoppel. As set forth above, plaintiff contends that defendant's obligation to render performance to an assignee arose out of the 1949 agreement; that having given its consent to an assignment, defendant was under a duty not to revoke the consent.

Plaintiff does contend that, even if this were not true, under the facts alleged in the amended complaint, plaintiff can show that defendant's consent to the assignment was binding because action of a substantial character was induced on the part of the plaintiff and "injustice can be

avoided only by enforcement of the promise.” Paragraph VIII of the amended complaint [R. 62] alleges that plaintiff sought consent to the assignment because of its losses and because of the ill-health of plaintiff’s president, and paragraph VII [R. 64] alleges that defendant’s general sales manager admitted that the decision to revoke the consent was made in order to decrease the number of dealers in the area. It is obvious, then, that defendant used information in regard to plaintiff’s economic condition which it obtained by ostensibly cooperating with plaintiff to procure a purchaser, to revoke the consent in the hope that plaintiff would be forced out of business and consequently, the number of dealers in the area would be decreased. The revelation to defendant of plaintiff’s economic condition and the inability of plaintiff’s president to participate in the management of plaintiff’s business, constitute a substantial change of position on the part of plaintiff which was induced by defendant’s consent to the assignment, and injustice to plaintiff can be avoided only by holding that the consent once given could not be revoked.

Defendant’s contention that plaintiff did not rely on defendant’s promise is utterly without merit. Paragraph X of the amended complaint [R. 63] alleges that plaintiff entered into negotiations with the purchasers referred to it by defendant, which negotiations resulted in a final sale of plaintiff’s business with all terms of the sale agreed upon. All plaintiff’s acts were done with the full knowledge and consent of those persons who executed the original agreement between defendant and plaintiff.

V.

Reply to Appellee's Point V.

Plaintiff believes that in accordance with Rule 8 of the Federal Rules of Civil Procedure, when all doubts are resolved in favor of the complaint's sufficiency, it has "stated a claim on which relief could be granted." (*Gruen Watch Co. v. Artists Alliance* (9 Cir. 1951), 191 F. 2d 700.) If this court, however, feels that more facts should be pleaded, then plaintiff requests that the order dismissing the action be reversed and that plaintiff be permitted to file an amended complaint.

Respectfully submitted,

SPRAY, GOULD & BOWERS,

By CHARLES P. GOULD,

Attorneys for Appellant.



No. 15212

United States
Court of Appeals
for the Ninth Circuit

MIKE ERCEG,

Appellant,

vs.

FAIRBANKS SCHOOL DISTRICT, SYLVIA
RINGSTAD, D. H. DOXEY, GEORGE ED-
MONDSON and E. M. HUFFORD,

Appellees.

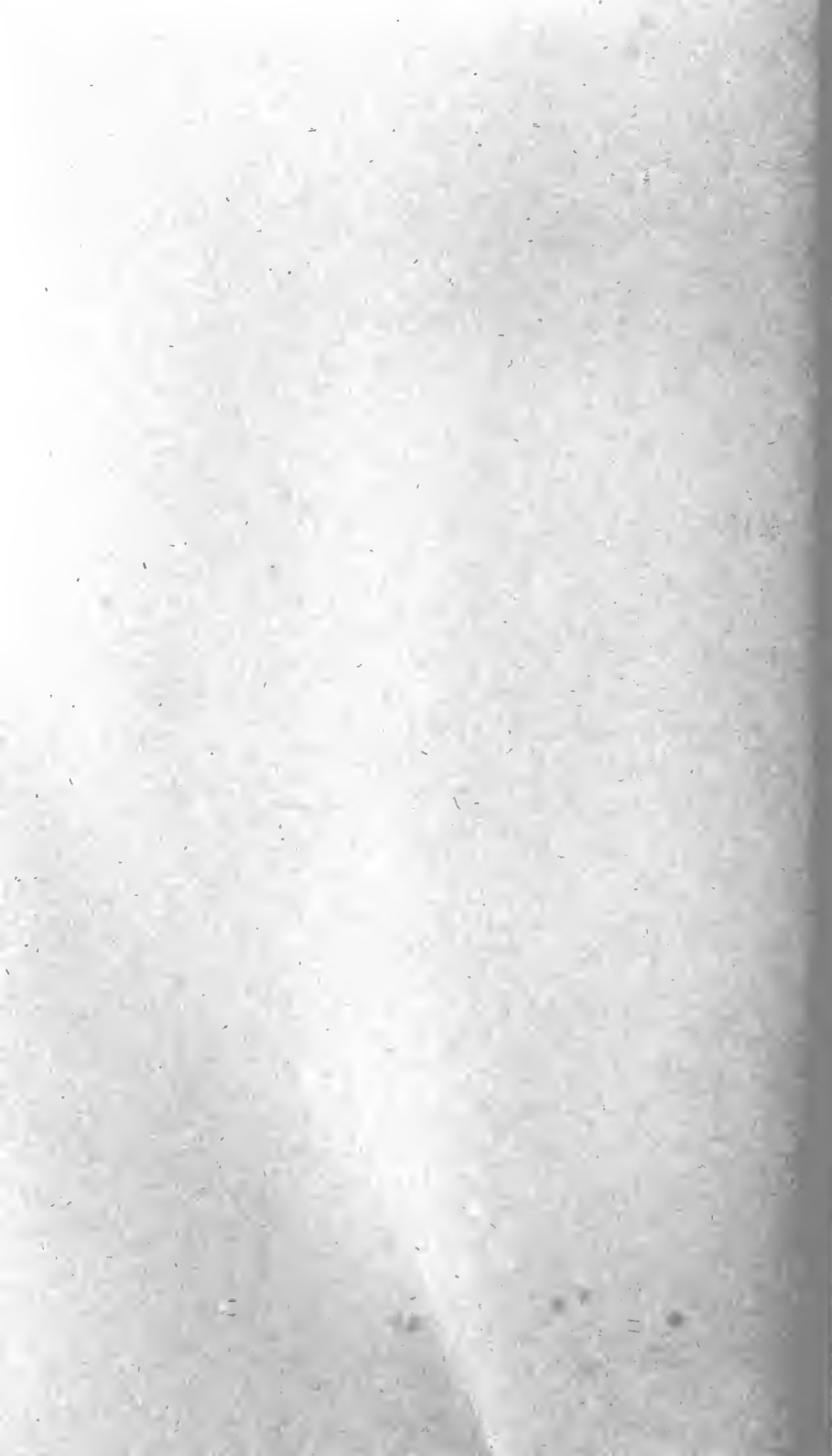
Transcript of Record

Appeal from the District Court
for the District of Alaska,
Fourth Division.

FILED

OCT 10 1956

PAUL P. O'BRIEN, CLERK



No. 15212

**United States
Court of Appeals**
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MIKE ERCEG,

Appellant,

vs.

FAIRBANKS SCHOOL DISTRICT, SYLVIA
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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E. M. Hufford;

Attorneys for Defendants and

Appellees.



In the District Court for the District of Alaska,
Fourth Judicial Division

No. 9008—Civil

MIKE ERCEG,

Plaintiff,

vs.

FAIRBANKS SCHOOL DISTRICT, an Independent School District Corporation; SYLVIA RINGSTAD, D. H. DOXEY, GEORGE EDMONDSON, and E. M. HUFFORD,

Defendants.

COMPLAINT

Plaintiff alleges as follows:

I.

That at all times herein mentioned plaintiff has been and now is a resident within the Fairbanks School District and the owner of certain real property situate in said Fairbanks School District and more fully described as follows, to wit:

1. Patent No. 1101214, Mineral Survey No. 1692, which includes Claims Nos. 3, 4, 5 and 6 of First tier, Left Limit, St. Patrick Creek, and 5 below Creek Claim of a total area of 107.609 acres;

2. Patent No. 1031018, Mineral Survey No. 1988, Hoosier Claim, consisting of 12.964 acres;

3. Patent No. 900524 Mineral Survey No. 847, consisting of one-third of 140.70 acres;

3. Patent No. 113077, Mineral Survey No. 2078, consisting of Keystone and Alaska Association, and comprising an area of 44.22 acres;

5. Patent No. 899,571, Mineral Survey No. 853, consisting of Lower one-quarter of No. 22, 23 Association and 24 Association on Goldstream Creek, and comprising 82.20 acres.

That all of said mining claims are undeveloped, patented Placer claims.

II.

That the defendant is an independent school district corporation incorporated under the laws of the Territory of Alaska, with its principal place of business in Fairbanks, Alaska, and vicinity, having the power to tax real and personal property situate in said school district subject to the limitations presented by the laws of the United States and the Territory of Alaska, which provided prior to March 22, 1955, that no patented undeveloped mining ground should be valued in excess of \$500.00 per each twenty acres thereof, and that after the 22nd day of March, 1955, such mining ground should not be valued in excess of \$200.00 per twenty-acre claim.

III.

That disregarding the limitation of valuation as provided by law, the defendant did in the years of 1949 and 1950, place a valuation upon certain of the undeveloped patented placer mining claims described in Paragraph I of this complaint, as follows:

Year	Patent Number	Description	Valuation	Tax
1949	1101214	#3 below 1 T, LL	\$ 2,000.00	\$ 20.00
1949	1031018	Hoosier Claims 12 A	1,300.00	13.00
1949	1101214	5 below Cr. Cl. 16.07A	1,610.00	16.10
1949	900524	1/3 Long Ass'n. 47.A	4,700.00	47.00
1949	1113077	Keystone Ass'n. 20.A	2,000.00	20.00
1949	1113077	Alaska Ass'n. 24.22 A	2,500.00	25.00
1949	899571	Lower 1/4 of No. 22, 16 A	1,600.00	16.00
1949	899571	23 A Placer 20	2,000.00	20.00
1949	899571	24 Ass'n. 48	4,800.00	48.00
1949	1011214	4-5-6 below 1T-LL 64.5A	6,450.00	64.50
Totals.....			\$28,960.00	\$289.60

That the valuation and tax in the year 1950 were as the year 1949 hereinabove set forth, to-wit: Total valuation, \$28,960.00; Total tax, \$289.60.

III.

That in the years of 1951-1952 and 1953, the said mining claims of plaintiff were assessed by the Assessor of the defendant, Fairbanks School District, as follows:

1951.....	Valuation: \$22,400.00	Tax Levy: \$224.00
1952.....	Valuation: \$22,400.00	Tax Levy: \$224.00
1953.....	Valuation: \$22,400.00	Tax Levy: \$224.00

IV.

That on or about May and June, 1953, the defendant, Fairbanks School District, did offer at public sale the following described claims for the payment of taxes, interest, penalty, advertising, legal, and further interest as follows:

Patent No. 1101214, 4-5-6 Below 1T-LL St. Patrick Creek:

Year	Taxes	Penalty	Interest	Advertising & Legal	Total
1949	\$64.80	\$6.48	\$29.13	\$57.87	\$158.28
1950	64.80	6.48	20.43	52.86	144.57
					\$302.85
Plus: 15% interest.....					91.28
Total.....					\$394.13

That said claims were duly offered at public sale and sold to one E. M. Hufford for \$394.13, that being the best and highest bid for cash.

V.

That on the 22nd day of June, 1954, the defendant, Fairbanks School District, did offer at public sale the following described claims for the payment of taxes, interest, penalty, advertising and legal, and further interest as follows:

Patent No. 1031018, Hoosier Placer Claim on St. Patrick Creek, 12.964 acres:

Year	Taxes	Penalty	Interest	Advertising & Legal	Total
1951	\$13.00	\$1.30	\$ 4.08	\$25.50	\$ 43.58
1952	13.00	1.30	2.50	25.00	42.30

Patent No. 1101214, No. 3 Below 1T-LL, St. Patrick Creek, 18.5 acres:

Year	Taxes	Penalty	Interest	Advertising & Legal	Total
1951	\$19.00	\$1.90	\$ 5.97	\$25.50	\$52.37
1952	19.00	1.90	3.65	25.50	50.05

Patent No. 1101214, No. 5 Below Creek Claim, St. Patrick Creek, 16.1 acres:

Year	Taxes	Penalty	Interest	Advertising & Legal	Total
1951	\$16.00	\$1.60	\$ 5.03	\$25.00	\$48.13
1952	16.00	1.60	3.07	25.50	46.17

Patent No. 1113077, Placer Claim, Keystone on St. Patrick Creek, 20 acres:

Year	Taxes	Penalty	Interest	Advertising & Legal	Total
1951	\$20.00	\$2.00	\$ 6.29	\$17.00	\$45.29
1952	20.00	2.00	3.85	17.00	42.85

Patent No. 1113077, Placer Claim, Alaska Association on St. Patrick Creek, 24.22 acres.

Year	Taxes	Penalty	Interest	Advertising & Legal	Total
1951	\$25.00	\$2.50	\$ 7.86	\$17.00	\$52.36
1952	25.00	2.50	4.81	17.00	49.31

Patent No. 900524, Placer Claim Long Association on St. Patrick Creek, 140.7 acres, one-third plaintiff's:

Year	Taxes	Penalty	Interest	Advertising & Legal	Total
1951	\$47.00	\$4.70	\$14.77	\$25.50	\$91.97
1952	47.00	4.70	9.04	25.00	86.24

Patent No. 899571, Placer Claim 23A on Goldstream, 19.30 acres:

Year	Taxes	Penalty	Interest	Advertising & Legal	Total
1951	\$20.00	\$2.00	\$ 6.29	\$17.00	\$45.29
1952	20.00	2.00	3.85	17.00	42.85

Patent No. 899571, Placer Claim, 24 Association on Goldstream Creek, 47.40 acres:

Year	Taxes	Penalty	Interest	Advertising & Legal	Total
1951	\$48.00	\$4.80	\$15.08	\$17.00	\$84.88
1952	48.00	4.80	9.23	17.00	79.03

Patent No. 899571 Placer Claim Lower $\frac{1}{4}$ of 22A on Goldstream Creek, 15.50 acres:

Year	Taxes	Penalty	Interest	Advertising & Legal	Total
1951	\$16.00	\$1.60	\$ 5.03	\$17.00	\$39.63
1952	16.00	1.60	3.07	17.00	37.67

VI.

That at said public sale held on the 22nd day of June, 1954, the defendant, Fairbanks School District, did sell to the following named persons certain claims hereinbefore mentioned at the price bid named herein:

To: Sylvia Ringstad, Fairbanks, Alaska,

Patent No. 1031018, Hoosier Placer Claim on St. Patrick Creek for \$100.00;

Patent No. 1101214, 3 below 1T-LL, Placer Claim on St. Patrick Creek for \$105.00;

Patent No. 1113077, Keystone Placer Claim on St. Patrick Creek for \$110.00.

To: D. H. Doxey, of Fairbanks, Alaska,

Patent No. 1101214, 5 below Creek Placer Claim on St. Patrick Creek for \$95.00.

To: George Edmondson, of Fairbanks, Alaska,

Patent No. 1113077, Alaska Association Placer Claim on St. Patrick Creek for \$105.00;

Patent No. 899571, Lower $\frac{1}{4}$ of 22A Placer Claim on Goldstream Creek for \$80.00;

Patent No. 899571, 23A Placer Claim on Goldstream Creek for \$90.00.

To: Fairbanks School District,

Patent No. 900524, Long Association Placer Claim on St. Patrick Creek for \$178.21;

Patent No. 899571, 24 Association Placer Claim on Goldstream Creek for \$163.91.

VII.

That on the 19th day of June, 1953, the plaintiff paid to the defendant, Fairbanks School District, the sum of \$1,057.87, the same being paid under protest, which protest was endorsed upon the reverse side of the checks given in payment. That the said sum of \$1,057.87 was sufficient to pay all back taxes and leave a substantial balance for future taxes on said mining claims, as the maximum tax that legally could have been levied against all the said claims was \$70.00 for each taxable year.

Title 48, Section 78, U. S. Code Annotated, provides as follows:

“All taxes shall be uniform upon the same class of subjects and shall be levied and collected under the general laws, and assessments shall be according to the true value thereof, except that unpatented mining claims, and undeveloped patented mining claims, which are also unimproved, may be valued at the price paid the United States, or at a flat rate fixed by the legislature.”

Chapter 10, Session Laws of Alaska, 1949, in Section 3, provides as follows:

“* * * For the purposes of this section the assessed value of unimproved, unpatented mining claims which are not producing, and nonproducing patented mining claims upon which the improvements originally required for patent have become useless through deterioration, removal or otherwise, is hereby fixed at \$500.00 per each 20 acres or fraction of each such claim * * *”

Section 4 of Chapter 10, Session Laws of Alaska, 1949, provides:

“The tax levied under Section 3 upon the property within the limits of an incorporated city or town, independent school district or incorporated school district in the Territory shall be assessed, collected and enforced in the manner prescribed by the property tax law of the municipality or district * * *”

VIII.

That at all times herein mentioned the defendant, Fairbanks School District, has placed a ficti-

tious, confiscatory, arbitrary, capricious and unlawful valuation on mining claims, as follows:

Real property, other than mining claims, was assessed at 75% of its full and true value;

Unpatented lode claims assessed at \$50.00 per acre;

Patented lode claims assessed at \$250.00 per acre;

Unpatented placer claims assessed at \$25.00 per acre;

Patented placer claims assessed at \$100.00 per acre;

Tax was levied upon 100% of said fictitious and unlawful valuation.

IX.

That the assessment of said mining claims of plaintiff were each made arbitrarily and capriciously and without regard to their value and without regard to the limitation of the valuation established by the laws of the United States of America and the Territory of Alaska on undeveloped patented mining claims as hereinbefore set forth.

X.

That on the 17th day of June, 1955, the plaintiff, by his agent, mailed to the defendant School District's Tax Collector, a check in the sum of \$707.25 in payment of the redemption of all those claims sold for taxes in June, 1954. That the said check was returned to plaintiff with a letter in which he was advised that the amount required to redeem said claims was \$2,034.67. That a summary of

charges attached to said letter indicated that of that sum \$517.28 was interest; \$484.73 was legal fees and advertising; and \$79.16 was penalties; and only \$953.60 was taxes based upon an assessment of \$100.00 per acre.

XI.

That based upon the maximum valuation of patented, undeveloped placer mining claims provided by Chapter 10, Session Laws of Alaska, 1949, which might be placed upon said type of claims, the greatest amount of tax that could be imposed in any one year upon the mining claims of plaintiff would be \$70.00.

That based upon the provisions of Section 78, Title 48, U.S.C.A., and Section 48-1-1 ACLA, taxes may be levied upon the class of mining claims herein mentioned according to the price paid the United States for the same by the owner. The price to be paid the United States, according to Section 37, Title 30, U.S.C.A., and Section 47-3-84 ACLA, 1949, for such mineral claims is \$2.50 per acre in the event there is no vein or lode in the claims. Therefore, the maximum tax that could be levied by defendant school district was fifty cents per claim for each taxable year.

Therefore, taking the United States Statutes into consideration, the maximum tax that could be levied upon plaintiff's undeveloped, patented placer mining claims hereinbefore described for the years 1949, 1950, 1951, 1952, 1953 and 1954 would be \$7.23 per year, or \$43.38 for all of said taxable years.

Taking into consideration the laws of the Territory of Alaska, establishing a maximum valuation on undeveloped patented mining claims at \$500.00 for each of such claims, the annual levy would be \$70.00, and the total for all of said taxable years would be \$420.00.

XII.

That there is now due and owing from said Fairbanks School District to the plaintiff the sum of \$1,014.49, together with interest on said sum at the rate of 6% per annum from June 26, 1953.

Wherefore, plaintiff prays for a decree of this Court as follows:

(a) Declaring the assessment of valuation of plaintiff's property, and levy of tax thereon, illegal and void;

(b) Setting aside and vacating the tax sales of plaintiff's mining claims to defendants, Sylvia Ringstad, E. M. Hufford, George Edmondson, David H. Doxey, and Fairbanks School District;

(c) That the said taxes were illegally collected from the plaintiff;

(d) That the said assessments were illegally made;

(e) That the defendants be adjudged to restore to plaintiff full possession and enjoyment of all his property aforesaid;

(f) That the plaintiff have judgment against defendant, Fairbanks School District, in the sum of \$1,074.49, with interest thereon at the rate of 6% per annum from June 26, 1953.

(g) For such other and further relief as to the Court may seem just and equitable.

(h) For reasonable attorney fees and costs of this action.

TAYLOR & TAYLOR,
Attorneys for Plaintiff;

By /s/ WARREN A. TAYLOR,
Of Counsel.

Duly verified.

[Endorsed]: Filed April 4, 1956.

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the defendant, Fairbanks School District, an independent school district corporation, above-named, by Maurice T. Johnson, its attorney, under provisions of Rule 12(b), Federal Rules of Civil Procedure, 28 USCA, and respectfully moves the Court to dismiss the above-entitled cause upon the ground that the complaint fails to state a claim upon which relief can be granted for the following reasons:

(a) That the plaintiff has failed to comply with the provisions of Section 16-1-124, ACLA 1949.

(b) That the plaintiff has failed to comply with the provisions of Section 16-1-131, ACLA 1949.

This motion is based upon the records and files in this case and upon the brief of the defendant, Fairbanks School District, filed in support hereof.

Dated at Fairbanks, Alaska, this 19th day of April, 1956.

/s/ MAURICE T. JOHNSON,
Attorney for Defendant,
Fairbanks School District.

Receipt of copy acknowledged.

[Endorsed]: Filed April 20, 1956.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 9008 Civil

MIKE ERCEG,

Plaintiff,

vs.

FAIRBANKS SCHOOL DISTRICT, an Independent School District Corporation; SYLVIA RINGSTAD, D. H. DOXEY, GEORGE EDMONDSON, and E. M. HUFFORD,

Defendants.

ORDER OF DISMISSAL

This cause having been heretofore taken under advisement on the motion of the defendants Fairbanks School District, D. H. Doxey, and E. M. Hufford, to dismiss the complaint, after due consideration of the briefs filed herein and the Court being fully advised in the premises, said motion to dismiss is granted for the reason that the complaint

fails to state a claim on which relief can be granted,
and

It Is Ordered that this action be and it is hereby
dismissed.

Dated May 29, 1956.

/s/ VERNON D. FORBES,
District Judge.

[Endorsed]: Filed and entered May 29, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Mike Erceg, the
plaintiff above-named, hereby appeals to the United
States Court of Appeals for the Ninth Circuit from
the Order of Dismissal entered in this action on
or about the 29th day of May, 1956.

Dated at Fairbanks, Alaska, this 13th day of
June, 1956.

TAYLOR & TAYLOR,

By /s/ WARREN A. TAYLOR,
Of Counsel for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed June 22, 1956.

[Title of District Court and Cause.]

APPEAL BOND

Mike Erceg, appellant herein, as principal, and Maurice J. Killion and Robert J. Rogers, as sureties, appearing and submitting to the jurisdiction of the Court, hereby undertake for themselves, and each of them, their, and each of their, heirs, executors, administrators, successors and assigns, to make good all taxable costs and charges, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), that the appellees may be put to, or allowed, if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified.

The said sureties hereby irrevocably appoint the clerk of the above-entitled Court as their agent upon whom any papers affecting their liability on this undertaking may be served.

Signed, sealed and delivered this 20th day of June, 1956.

/s/ MIKE ERCEG,
Principal, Appellant.

/s/ MAURICE J. KILLION,

/s/ ROBERT J. ROGERS,
Sureties.

United States of America,
Territory of Alaska—ss.

Maurice J. Killion and Robert J. Rogers each being duly sworn, say: That I am a surety on the foregoing Appeal Bond; that I am a resident within the District of Alaska; that I am not a counselor or attorney at law, deputy marshal, commissioner, clerk of any court, or other officer of any court, and that I am worth the sum of \$250.00 over and above all debts and liabilities and property exempt from execution.

/s/ MAURICE J. KILLION,

/s/ ROBERT J. ROGERS.

Subscribed and sworn to before me this 20th day of June, 1956.

[Seal] /s/ ELVA JACKSON,
Notary Public in and for
Alaska.

My commission expires: 2/23/60.

Receipt of copy acknowledged.

[Endorsed]: Filed June 22, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings in this cause listed on the

plaintiff's and appellant's Designation of Contents of Record on Appeal, viz:

1—Complaint.

2—Motion to Dismiss.

3—Brief in Support of Defendant Fairbanks School District's Motion to Dismiss.

4—Brief in Opposition to Defendant's Motion to Dismiss.

5—Order of Dismissal.

6—Notice of Appeal.

7—Statement of Points.

8—Designation of Contents of Record on Appeal.

9—Appeal Bond.

Witness my hand and the seal of the above-entitled Court this 21st day of July, 1956.

[Seal] /s/ JOHN B. HALL,
 Clerk of Court.

[Endorsed]: No. 15212. United States Court of Appeals for the Ninth Circuit. Mike Erceg, Appellant, vs. Fairbanks School District, Sylvia Ringstad, D. H. Doxey, George Edmondson and E. M. Hufford, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed July 26, 1956.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellant will rely on appeal are:

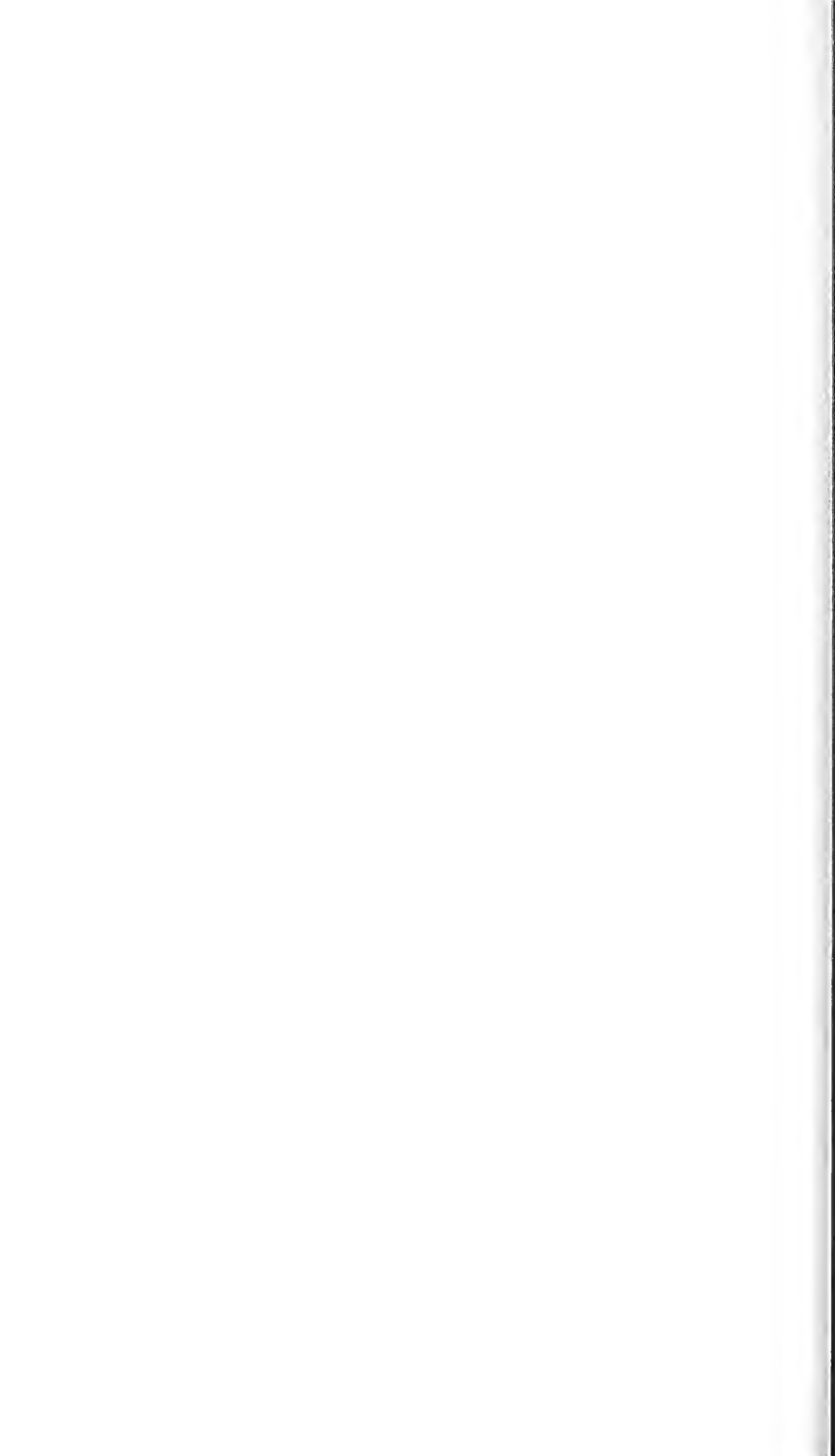
1. That the Court erred in sustaining defendants' Motion for Dismissal of the action.
2. That the Order of the Court dismissing the action was contrary to law.

TAYLOR & TAYLOR,

By /s/ WARREN A. TAYLOR,
Of Counsel for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 9, 1956.



No. 15,212

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MIKE ERCEG,

Appellant,

VS.

FAIRBANKS SCHOOL DISTRICT, et al.,

Appellees.

**Appeal from the District Court for the District of Alaska,
Fourth Division.**

BRIEF FOR APPELLANT.

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Attorneys for Appellant.

FILED

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PAUL P. O'BRIEN, CLERK



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No. 15,212

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MIKE ERCEG,

Appellant,

VS.

FAIRBANKS SCHOOL DISTRICT, et al.,

Appellees.

Appeal from the District Court for the District of Alaska,
Fourth Division.

BRIEF FOR APPELLANT.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from an Order of the District Court for the District of Alaska, Fourth Division, entered May 29, 1956, dismissing plaintiff's complaint. The order appealed from was a final decision by the Court below and as such may be appealed to this Court under the provisions of Title 28, USCA, Section 1291.

II.

STATEMENT OF THE CASE.

That for many years prior to 1949, appellant was the owner of the patented, undeveloped mining claims

described in plaintiff's complaint. These claims had been patented by appellant in 1928 or thereabouts. That he had held said claims as unpatented placer mining claims from 1908 to the year of patent.

That Federal Law (Title 48, Section 78, USCA) provided that the tax which may be levied upon patented undeveloped placer mining claims was according to the price paid the United States for the same by the owner. The price to be paid by the owner under the provisions of Section 37, Title 30, USCA and Section 47-3-84 ACLA, 1949, for such mineral claims was and still is \$2.50 per acre, which would make the valuation of said claims as \$50.00. One per cent (1%) tax would therefore be fifty cents (.50) per claim of twenty acres.

On June 3, 1948 the Organic Act for Alaska was amended to allow the Legislature of the Territory of Alaska to establish a flat rate for taxation of various types of mining claims including patented non-producing placer claims. Appellant's claims were all of this class.

By Chapter 10, Session Laws of Alaska, 1949, the maximum valuation which could be placed on patented, non-producing claims was \$500.00 for each 20 acres or fraction thereof.

The appellee herein is an independent school district with power of taxation of appellant's claims subject to the limitations prescribed by the laws of the United States and the Territory of Alaska.

That in 1949 the appellee School District's Tax Assessor assessed the valuation of appellant's claims as

\$28,960.00, and levied a tax of \$289.60 against said claims, which was approximately \$20.00 for each 20 acres.

That in June, 1953, the appellee offered for sale those claims shown in the tax roll as Pat. No. 1011214, 4-5-6 Below 1st Tier, Left Limit, 65.5 acres and sold said claims to one E. M. Hufford for \$393.13.

That following said sale the appellant did pay to the appellee the sum of \$1057.87 which payment was made under protest by appellant.

That on June 22, 1954, the appellee did sell at public sale the said claims, excepting the 65.5 acres previously sold to E. M. Hufford, and the same were sold to the parties set forth at pages 7 and 8 of the transcript of record.

That on the 17th day of June, 1955, appellant tendered payment for redemption of the claims sold on June 22, 1954, which check was in the sum of \$707.25, and was made under protest. Said check was refused and appellant was informed that \$2,-034.67 was the sum necessary to redeem said claims. Appellant was informed that of said amount \$953.60 was taxes; \$517.28 interest; \$484.73 was legal fees and advertising; \$79.16 was penalties. That the entire holdings of appellant had been assessed at \$100.00 per acre.

That the appellee had placed an unlawful fictitious value on said claims which were confiscatory, capricious and arbitrary. That the assessment of real property by the assessor was as follows:

Real property, other than mining claims, was assessed at 75% of its full and true value.

Unpatented lode claims assessed at \$50.00 per acre.

Patented lode claims assessed at \$250.00 per acre.

Unpatented placer claims assessed at \$25.00 per acre.

Patented placer claims assessed at \$100.00 per acre.

Tax was levied upon 100% of said fictitious and unlawful valuation.

To appellant's complaint, defendants, Fairbanks School District, D. H. Dexey and E. M. Hufford, filed a Motion to dismiss the action, supported by a brief in support of such Motion.

The District Court granted said Motion and dismissed the action.

III.

SPECIFICATION OF ERROR.

1. That the Court erred in sustaining defendants' Motion to dismiss action.
2. That the Order Dismissing the action was contrary to law.

IV.

ARGUMENT OF THE CASE.

It is respectfully represented that appellee's contention that appellant did not comply with the provisions of Section 16-1-24 ACLA 1949 is not well taken. It is believed that the said statutory provision is applicable to the case at bar.

In the present instance the value of the claims was established by law, the Congress of the United States having fixed the value of non-producing patented claims at \$2.50 per acre or \$50.00 for a 20-acre claim. In 1948, the Legislature of Alaska, was, by an amendment to the Organic Act, allowed to place a flat valuation on mining claims for the purpose of taxation.

In 1949, the Legislature in enacting a general property tax, placed a valuation of \$500.00 on non-producing patented claims, which, with a 1% tax rate, would result in a tax of \$5.00.

In the first instance there must be a legal assessment before there can be a lawful collection of a tax.

Halferty v. Kansas City P & L Co., 145 S.W. (2d) 116;

Fumulty v. District Court, 102 Fed. (2d) 254.

It is contended that the assessment was fraudulent and arbitrary and was violative of Federal and Territorial laws, and being so would not come under the provisions of Section 16-1-124 and 16-1-131, ACLA 1949. An assessment and tax in contravention of the amount set by statute would be illegal *ab initio*.

Appellee's contentions are predicated upon an "absence of fraudulent or arbitrary conclusion on the part of the assessing officers." As we have pointed out, there were fraudulent and arbitrary conclusions on the part of the taxing and assessing officers. A total disregard of the prevailing statutes would certainly constitute arbitrary and fraudulent conclusions.

The appellant called this illegality to the attention of the taxing authorities when he paid \$1057.00 under protest.

It is difficult to follow appellee's reasoning regarding the applicability of Section 16-1-131, ACLA 1949, to the case at issue. The law in force at the time of the assessment provided that \$5.00 per claim was the maximum tax on mining claims such as described in the complaint. Appellant had 14 claims, and the maximum tax would have been \$70.00, but in 1953 he paid to the appellee the sum of \$1057.00.

How could he comply with Section 16-1-131, when he had greatly overpaid the school district. Where the greatest tax to which he could be subjected for the years in question was \$140.00, he paid \$1057.00. He had or should have had a large credit balance on the books of the appellee, School District.

There certainly was no "absence of fraudulent and arbitrary assessment" by the assessing officer.

It is held that all proceedings prescribed by law for the assessment of land for the purpose of taxation must be substantially, if not strictly complied with, and the rules applicable to assess-

ments have been required to be strictly construed in favor of the land owner.

Wasden v. Toeli, 117 Pac. (2d) 465;

Title and Guarantee Co. v. Allen, 256 N.Y.S. 400.

Assessment has been on the valuation in the manner prescribed by law.

Republic Ins. Co. v. Highland Park, 57 S.W. (2d) 627;

McCracken v. McFadden, 122 S.W. (2d) 761;

North Co. v. Phila. Coal Co. 131 Fed. (2d) 562.

In the case at bar the assessment of mining claims was taken from the assessing officers of the school board and established by law. When the Federal government and the Legislature determine the mode and manner in which different forms of property may be valued for taxation, the method described by them must be followed.

Parsons v. Detroit, 15 Fed. Supp. 986;

Denver v. Lewin, 105 Pac. (2d) 854;

Flynn Estate v. Board, 286 N.W. 483;

Evanson v. Pollville, 3 N.W. (2d) 650;

Anderson v. Park R., 72 N.E. (2d) 210;

Washington v. Wiley, 31 Pac. (2d) 539;

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People v. Edison, 32 N.E. (2d) 902;

Dallas Co. v. Dallas Bank, 179 S.W. (2d) 288;

Helin v. Grosse Pt., 45 N.W. (2d) 338.

Where a case is within a constitutional or statutory provision so declaring the surface of mineral land

purchased from the Federal Government is to be valued at the price paid the government. Under some organic provisions, valuation of unpatented or non-producing patented mining claims may or should be a flat rate.

Hess v. Mullaney, 91 Fed. Supp. 139;

Mullaney v. Hess, 189 Fed. (2d) 417;

Superior Coal v. Mendenhall, 41 Pac. (2d) 14;

Shell v. Morris, 11 Pac. (2d) 774.

The aggrieved has the right of action for illegal taxes.

86 Fed. (2d) 633;

196 Atlantic 656;

Ogder v. Armstrong, 168 U.S. 224, 42 L.Ed. 444;

Moore v. Rose, 77 L.Ed. 1265;

Ward v. Leve Co., 64 L.Ed. 759;

Union Pacific v. Dodge Co., 25 L.Ed. 196;

Swift v. U. S., 28 L.Ed. 341;

Stanley v. Albany Co., 30 L.Ed. 1000;

Chesborough v. U. S., 48 L.Ed. 432;

Pierce v. Green, 131 A.L.R. 335;

Sioux City Bridge v. Dakota, 67 L.Ed. 340, 28 A.L.R. 979.

Appellant finds no basis upon which appellee predicates his statement "Assessors may take into consideration the fact that it contains undeveloped minerals in such quantity as to enhance the value of the land over its mere surface value".

They shut their eyes to the fact that the Congress of the United States and the Legislature of Alaska

was withheld from taxing districts, the power to assess the value of mining claims.

Appellee also states that Section 98, Title 48 USCA is simply a permissive statute. They did not mention that the Legislature has limited the assessment of valuation for taxation purposes. Do they contend that the Territorial Act is simply permissive?

Appellant contends that both the Federal and Territorial Acts impose an absolute limitation on assessment of mining claims of the class owned by appellant.

“Where the public interest or private right requires that a thing be done, permissive language is generally construed as being mandatory.”

Mullaney v. Hess, 189 Fed. (2d) 417;

Hayes v. Los Angeles, 33 Pac. 766;

Steward Co. v. Alameda, 76 Pac. 481;

Malone v. Van Etten, 178 Pac. (2d) 382;

Crawley v. Board, 200 Pac. (2d) 107.

Property cannot be taxed beyond its value.

Rogers v. Pike Co., 157 S.W. (2d) 346.

In this case the valuation of mining claims has been set by law. To exceed this legal valuation for taxation constituted an arbitrary, fraudulent and illegal assessment.

Being an illegal assessment the case does not fall within the framework of Sections 16-1-124 and 131, ACCLA 1949.

In the present instance the illegal, arbitrary and fraudulent assessment has led to confiscation. The appellant has lost the mining claims he has held since 1908.

He protested the illegality of the assessment with his payment of \$1057.00 in 1953, but his protest went unheeded.

The Fairbanks School District illegally assessed unlawful taxes against appellant, and now comes into Court and says that because he does not tender more money into Court, he shall be deprived of his remedy and of his property.

Appellee, in his brief in support of his motion to dismiss touched upon presumptions in favor of tax being correct; that the good faith of tax assessors and the validity of their acts are presumed; that the burden of proving that the tax is excessive is on the taxpayer, but in no instance does the defendant touch upon the remedy available to the taxpayer when the assessment and levy are, without doubt, illegal.

When a taxpayer proves that the assessment of a tax is illegal, as in this case, he can bring suit to recover his property and excess taxes paid.

To hold otherwise would be tantamount to rewarding the taxing power for doing an illegal act.

In this case an old man, holding claims since 1908, is being deprived of his claims by the illegal act of the assessor. The appellant did what he could to prevent the illegality by paying under protest the sum of \$1057.00 in 1953 and further tendering his check in the sum of \$707.00 in 1954 for redemption of claims sold at tax sale in that year. This check was likewise paid under protest.

In 1953, he called the assessor's attention to the illegal assessment but to no avail as the assessor con-

tinued to assess at the rate far in excess of the rate established by statute. Forty-six years of ownership, twenty-eight of which was ownership by patent from the Federal Government, was nullified by an illegal assessment by the School District Assessor.

When appellant received the patent the Federal Government in effect said that he could be taxed only on the valuation based upon what he paid the government for the claims, which was \$50.00, with a tax of 50c per year per claim.

V.

CONCLUSION.

From the foregoing statement of facts and the law, appellant contends that the District Court erred in dismissing the said action, and that the said Order of Dismissal should be reversed and the case remanded for trial.

Dated, Fairbanks, Alaska,
November 19, 1956.

Respectfully submitted,

TAYLOR AND TAYLOR,

By WARREN A. TAYLOR,

Attorneys for Appellant.

Service of a copy of the foregoing is hereby acknowledged this 19th day of November, 1956.

MAURICE T. JOHNSON.



No. 15,212

United States Court of Appeals
For the Ninth Circuit

MIKE ERCEG,

Appellant,

VS.

FAIRBANKS SCHOOL DISTRICT, SYLVIA
RINGSTAD, D. H. DOXEY, GEORGE ED-
MONDSON and E. M. HUFFORD,

Appellees.

Appeal from the District Court for the District of Alaska,
Fourth Division.

BRIEF FOR APPELLEES.

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Of Counsel:

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*Attorney for Appellees, George Edmondson
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FILED

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No. 15,212

United States Court of Appeals For the Ninth Circuit

MIKE ERCEG,

Appellant,

VS.

FAIRBANKS SCHOOL DISTRICT, SYLVIA
RINGSTAD, D. H. DOXEY, GEORGE ED-
MONDSON and E. M. HUFFORD,

Appellees.

**Appeal from the District Court for the District of Alaska,
Fourth Division.**

BRIEF FOR APPELLEES.

STATEMENT OF CASE.

The complaint (Tr. 3-13), filed by the Appellant on April 4, 1956, alleges that the Appellant is the owner of certain mining ground located within the boundaries of the Fairbanks School District.

It alleges that the Fairbanks School District is an independent school district corporation organized under the laws of the Territory of Alaska and having the power to tax real and personal property situated in the District.

It alleges that certain valuations were placed upon mining claims owned by the Appellant for the years

1949 and 1950, and for the years 1951, 1952, and 1953, but not that these valuations were different from those placed on all other mining claims in the District.

It alleges that certain claims were sold by the School District at public auction for the payment of taxes, interest, penalty and advertising, at various public sales. The complaint does not allege, however, that the tax sales held by the School District were in any way invalid or not in accordance with the law.

The Complaint alleges that the Appellees, Fairbanks School District, placed certain valuations on mining claims; however, there is no allegation anywhere to show that these valuations were in any way peculiar to the mining claims of the Appellant, and the Complaint says that the valuations fixed applied to all mining ground located within the District and not only to that of the Appellant.

In Paragraph 9, the Appellant says that the assessment of his mining claims was made arbitrarily and capriciously; however, he fails entirely to allege that his ground was assessed or valued in any manner other than the uniform rate which applied on all mining ground within the District. Nowhere does the Complaint allege compliance with Section 16-1-124, Alaska Compiled Laws Annotated, 1949, or compliance with Section 16-1-131, Alaska Compiled Laws Annotated, 1949.

The Complaint prayed that the assessment and valuation of Appellant's property be declared illegal and void; that the tax sales be set aside; that the taxes were illegally collected; that the assessments were

illegally made; and that the Appellant be restored to full possession and enjoyment of his property; and that the Appellant have judgment against the School District and for costs and fees.

To this Complaint the Appellee, Fairbanks School District, filed a Motion to Dismiss under provisions of Rule 12(b), Federal Rules of Civil Procedure, 28 USCA, upon the ground that the Complaint failed to state a claim upon which relief could be granted because: (a) the Appellant had failed to comply with the provisions of Section 16-1-124, ACLA 1949 and (b) that the Appellant had failed to comply with the provisions of Section 16-1-131 ACLA 1949. This motion was joined in by the Appellees Sylvia Ringstad, D. H. Doxey, George Edmondson, and E. M. Hufford.

This Motion was granted and the action was ordered dismissed on May 29, 1956, by an order of the District Court, Fourth Judicial Division, District of Alaska. After the entry of this Order, the Appellant made no attempt to amend his Complaint to show compliance with Alaska Law, and it is believed that the Appellant elected to stand upon his original Complaint in taking this Appeal, because the Appellant would be unable to allege and prove compliance with applicable Alaska Law.

The applicable Alaska statutes are as follows:

Section 16-1-124, ACLA 1949. *Objections to assessment, tax or order for sale: Form and contents: Hearing: Evidence: Decision and Relief; Costs.* Any person owning, or having any legal or equitable interest in, or a lien upon any tract

listed in said duplicate delinquent roll, may appear and present at the time of hearing before the court, his objection to, and contest the validity of the assessment or tax on such property, or the granting of the order of sale thereof. Such objection shall be in writing and specify the grounds of objection to the assessment or tax on the particular tract represented in such objection and the court will hear and determine such objection and render such decision thereon as may be legal and just. At such hearing the duplicate tax roll shall be *prima facie* evidence of the regularity and legality of the assessment and levy of the tax and that the same is unpaid, and no objection to the valuation of the property, the manner of the assessment and levy of the tax, or any of the subsequent proceedings shall be entertained by the court which does not effect the substantial rights of the party interposing the objection. If at such hearing the court shall find any tract to be over valued, or over assessed, the same shall be adjusted on equitable principles so that the same shall bear its just proportion of the levy, and the invalidity of the tax on any one tract shall not be considered as a presumption of the illegality of the tax on any other tract. Provided, however, that if the court shall find that the assessment of the value of the property of the party objecting was so high in proportion to other property assessed as to satisfy the court that the city council in equalizing the assessment had acted in bad faith, the entire tax of the objecting party shall be held void, and the costs shall be taxed against the city. If the court find that the assessment was fairly made and equalized according to law, the tax duly levied and not paid when due

and due notice given of the hearing as provided herein, it will be sufficient to authorize the issuance of the order of sale. Provided that where on account of objections filed and hearing had the court may enter judgment against and order sale of all property to the tax on which no objection is made before the determination of the subjects in controversy. (L 1923, ch 97, sec 76, p 227; CLA 1933, sec 2443).

Section 16-1-131, ACLA 1949. *Action or proceedings to recover lands sold for taxes: Tender or payment into court of taxes, penalty, interest and costs.* In any action, suit, or proceeding for the recovery of lands sold for taxes under the provisions of this act, except the taxes have been paid or the lands redeemed as herein provided, the party claiming to be the owner against the holder of the tax title must with his complaint or answer tender and pay into court the amount of taxes for the payment of which the lands were sold, and penalty and interest and costs of sale, and interest from the date of sale at the rate of fifteen per cent per annum to the date of the tax deed or certificate and also any taxes the grantee in said tax deed or certificate, or the purchaser, may have paid on said lands, with interest thereon at the rate of twelve per cent per annum from the date of such payment to the date of the filing of his complaint or answer, the said sum to be for the benefit of the holder of the tax title in case the same should fail in such suit, action or proceeding and the court shall not consider any complaint, answer or other pleading until such tender or payment shall have been made. (L 1923, ch 97, sec 83, p 232; CLA 1933, sec 2450).

Section 37-3-54, ACLA 1949. *Lien and liability for taxes: Enforcement: Board to have taxing powers and duties of council: Refunds.* All taxes levied and assessed by the school board under this article shall be a lien upon the property assessed and such lien shall be prior and paramount to all other liens and encumbrances, and may be foreclosed by an appropriate action in any court of competent jurisdiction. The owner of the property assessed shall be personally liable for the amount of taxes assessed against such property; and such taxes, together with penalties and interest, may be collected after the same has become due, in a personal action brought in the name of the school district against such owner in any court of competent jurisdiction. Provided: that the school boards in independent school districts in the levy and collection of taxes shall have all of the powers and duties given to the common council of municipal corporations and the laws relative to the levy and collection of taxes in municipal corporations are hereby extended to Independent School Districts.

Further provided: That all provisions in Sections 1331 to 1336 inclusive, Compiled Laws of Alaska 1933 (Secs. 37-3-61-37-3-66 herein), requiring refunds of Territorial money to cities and incorporated school districts, and establishing procedures therefor, are hereby made applicable to Independent School Districts. (L 1935, ch 77, sec 14, p 163, am L Ex Sess 1946, ch 7, sec 2, p 46, effective March 29, 1946.)

ARGUMENT.

Under the provisions of Section 16-1-124, ACLA 1949, it is provided that any person owning, or having any legal or equitable interest in, or a lien upon any tract listed in the duplicate delinquent roll, may appear and present at the time of the hearing before the court his objection to, and contest the validity of the assessment or tax on such property at which time the court would conduct a hearing as to the validity of such tax or assessment. The complaint is silent as to any such allegation, although the complaint refers to delinquent tax sales which were held for the years 1949 through 1954. Consequently, before the Appellant could state a valid claim, he must first show that he exhausted the remedies provided by law. This the Appellant wholly failed to do. On the ground of public policy the law discourages suits for the purpose of recovering back taxes alleged to be illegally levied and collected. 51 *Am. Jur.* page 1005, sec. 1167.

Section 16-1-131, ACLA 1949, provides that in any action, suit, or proceeding for the recovery of lands sold for taxes, the party claiming to be the owner must with his complaint tender and pay into the court the amount of taxes for which the lands were sold, together with penalty, interest costs of sale, interest from the date of sale at fifteen per cent per annum to the date of the tax deed or certificate; and also any subsequent taxes paid on said lands with interest at twelve per cent per annum. The appellant failed to make such tender and payment into court. Therefore, the court could not consider the complaint

as filed. Since the statutes quoted were in existence at the time suit was filed, any remedy which the Appellant had must be exercised in the manner provided by the statute. In the absence of fraud, the courts can give relief of erroneous judgment of taxes assessed only in the manner and under such conditions as are prescribed by statute. 51 *Am. Jur.*, page 1006, sec. 1168, cases cited.

When a taxpayer claims that real estate is assessed too high, he should first apply for relief to the Board of Equalization of the School District and if denied, should seek relief through the courts in the manner prescribed. *Homan v. Board of Equalization*, Boone County, Nebr. 1942, 3 N.W. 2d p. 650.

Section 78, Title 48, USCA, is permissive with reference to mining claims and says they "may be valued at a price paid the United States therefor, or at a flat rate fixed by the legislature".

This section also provides that all taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws.

Cities and school districts in Alaska are permitted to levy and collect taxes under the general power contained in Section 37-3-54, ACLA 1949. Under the terms of this latter section, the above-mentioned Sections 16-1-124 and 16-1-131 are a part of the taxing authority and power delegated to school districts, of which the Appellee Fairbanks School District is one.

When the Alaska Legislature passed the General Property Tax Law known as Chapter 10, Session Laws

of Alaska, 1949, it provided in Section 4 that taxes levied under the provisions of Chapter 10 on property within the limits of an independent school district should be assessed, collected, and enforced in the manner prescribed by the Property Tax Law of the School District. As will be seen from the Complaint, the Fairbanks School District did not elect to collect any tax under Chapter 10, SLA 1949, but continued collection of taxes under the general authority of Sec. 37-3-54, ACLA 1949 as amended. Chapter 10, SLA 1949 was a separate and distinct act from Sec. 37-3-54, ACLA 1949, and Chapter 10 did not amend, repeal, or in any way change the authority granted in Sec. 37-3-54. Since that time, Sec. 10, SLA 1949 has been repealed by the Legislature. In *Hess v. Mullaney*, 213 Fed. 2d p. 635, this honorable Court said "Attention is called to the fact that Chapter 10 SLA 1949 provides no machinery by which the levy and collection of the one per cent tax by the cities and districts could be enforced or compelled."

Practically all authorities are to the effect that assessors, in valuing property for taxation, may take into consideration the fact that it contains undeveloped minerals in such quantity as to enhance the value of the land over its mere surface value. Minerals in place are not rendered non-taxable merely because of lack of legislative method and regulation for determining their value. Accordingly, an added value may be given real estate for purposes of taxation where there is sufficient reason to believe that the property contains mineral deposits in sufficient quantity to give

it a value as a prospective mine. 51 *Am. Jur.*, page 656, sec. 707.

The broad principal that in the absence of fraudulent or arbitrary conclusion on the part of the assessing officers and assessor or disproportionate valuation for tax purposes of particular property, or particular classes of property, the assessment is not invalid, has frequently been stated and recognized. *Orient Ins. Co. v. Board of Assessors*, 221 U.S. 358. The complaint alleged that all classes of property, including real estate and mining claims, were assessed uniformly and on the same basis. Consequently, this method of assessment was not fraudulent and the taxes levied are not invalid. 51 *Am. Jur.*, page 666, sec. 723.

All presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions are presumed. 51 *Am. Jur.*, page 620, sec. 655.

An examination of the authorities cited in Appellant's Brief fails to disclose any support for the theory that the requirements of Alaska laws may be waived or set aside. In fact, most of the authorities cited point out that the power of taxation is an essential and inherent attribute of sovereignty belonging as a matter of right to every independent government so long as tax legislation in form and substance conforms to the Organic Act and is confined to the enactment of what is in its nature strictly a tax law. The legislation is the supreme authority and courts as well as all others must obey.

That taxes appear to seem unjust and even unnecessary does not constitute a reason for judicial interference. The provisions of the Organic Act, Sec. 48-1-1, ACLA 1949, requiring uniformity of all taxes, requires only that the same means and methods be applied impartially to all constituents of each class so that it operates equally and uniformly upon all persons and corporations in similar circumstances. The due-process-of-law clause of the Federal Constitution has no application to ad valorem taxation except as to procedural questions. This position is amply supported by the Supreme Court of Colorado in the case of *City and County of Denver v. Lewin*, 105 Pac. 2d 854, cited by Appellant on page 7 of his Brief.

The burden of establishing that a particular valuation for tax purposes is excessive, unequal, or disproportionate is upon the taxpayer, and under our statute, Sections 16-1-124 and 16-1-131, Appellant has wholly failed to allege compliance with the law prior to bringing suit. 51 *Am. Jur.*, page 668, sec. 726.

It has been held that where a statute prescribes a method for review and reduction of excessive valuation of taxes, the remedy must be availed of within the prescribed period; and one not availing thereof in time cannot attack the assessment as depriving him of property without due process of law.

The assessments were in fact made by the officials charged with that duty under the statute; if excessive, there was an opportunity for review and correction which the Appellant did not take. *Rogers v. Hennepin*, 240 U.S. 184; *Orient Ins. Co. v. Board of As-*

sessors for Parish of Orleans, 221 U.S. 358, and *Standard Oil Co. v. McLaughlin* (9th Cir.) 67 Fed. 2d 116.

CONCLUSION.

For the reasons stated, it is abundantly clear that the judgment of dismissal of the action by the District Court, Fourth Judicial Division, District of Alaska, is correct and should be affirmed.

Dated, Fairbanks, Alaska,
January 4, 1957.

Respectfully submitted,

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IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

WILLIE BILL GANT, alias Wiley Gant,
and ULYSSES GANT, alias Junior Gant,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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Western District of Washington

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

I. STATEMENT OF JURISDICTION

The appellants, Willie Bill Gant, alias Wiley Gant, and Ulysses Gant, alias Junior Gant, were indicted in the District Court of the United States for the Western District of Washington, Northern Division, in Cause No. 49329, on December 14, 1955. The

accusations against both appellants were identical, and were contained in three counts as follows:

“The Grand Jury charges:

“COUNT I

“That during the period between March 10, 1955, and July 20, 1955, at Seattle, within the Northern Division of the Western District of Washington, WILLIE BILL GANT, alias Wiley Gant, and ULYSSES GANT, alias Junior Gant, wilfully, knowingly and unlawfully, did attempt to encourage and induce, directly and indirectly, and did encourage and induce, directly and indirectly, the entry into the United States of America of an alien female person, to-wit, Martha Marie Rose Harand, such alien not being lawfully entitled to enter or reside within the United States of America.

“All in violation of Section 1324(a), Title 8, U.S.C.

“COUNT II

“That during the period between July 20, 1955, and October 12, 1955, at Seattle, within the Northern Division of the Western District of Washington, WILLIE BILL GANT, alias Wiley Gant, and ULYSSES GANT, alias Junior Gant, wilfully, knowingly and unlawfully, did conceal, harbor and shield from detection and did attempt to conceal, harbor and shield from detection an alien female person, to-wit, Martha Marie Rose Harand, such alien not being lawfully entitled to enter or reside within the United States of America.

"All in violation of Section 1324(a), Title 8, U.S.C.

"COUNT III

"1. That on or about July 20, 1955, Martha Marie Rose Harand, an alien woman or girl, to-wit, a citizen of the Dominion of Canada, entered the United States of America from a country, party to the arrangement adopted July 25, 1902, for the suppression of the White Slave Traffic, to-wit, from the Dominion of Canada.

"2. That within three years after July 20, 1955, to-wit, during the period between July 20, 1955, and October 12, 1955, at Seattle, within the Northern Division of the Western District of Washington, WILLIE BILL GANT, alias Wiley Gant, and ULYSSES GANT, alias Junior Gant, did keep, maintain, control, and harbor in a house or place for the purpose of prostitution and other immoral purposes, Martha Marie Rose Harand, an alien woman or girl, and did fail within thirty days after commencing to keep, maintain, control, and harbor the said Martha Marie Rose Harand in a house or place for the purpose of prostitution and other immoral purposes, to file with the Commissioner of Immigration and Naturalization a statement in writing setting forth the name of such alien woman or girl, the place at which she is kept, and all facts as to the date of her entry into the United States of America, the port or place through which she entered, her age, nationality and parentage, and concerning her procurement to come to this country within the knowledge of such person.

"All in violation of Section 2424(a), Title 18, U.S.C."

Jurisdiction was conferred upon the District Court of the United States for the Western District of Washington, Northern Division, pursuant to the provisions of Title 18, United States Code, Section 3231. Inasmuch as the Indictment charged the appellants with the acts of inducement and concealment occurring at Seattle, Washington, and failure to file a statement concerning such acts during the period in which the named alien female was kept in Seattle, venue was properly laid in said district court under the provisions of Rule 18 of the Federal Rules of Criminal Procedure and Title 18, United States Code, Section 3237.

Trial by jury was had, and verdicts of guilty were returned against both appellants on all three counts on April 10, 1956. On April 30, 1956, the Court denied motions for new trial interposed on behalf of both appellants, and entered judgment against both.

The jurisdiction of this Court to review the judgment of the district court is conferred by the provisions of Title 28, United States Code, Section 1291.

II. STATEMENT OF THE CASE

Any references to testimony to be made herein will be designated by the abbreviation (R.T.), indicating Reporter's Transcript, and page number.

On or about July 19, 1955, one Martha Marie Rose Harand, born October 22, 1937, at Regina, Saskatchewan, and being the female named as victim in all counts of the Indictment, traveled from Vancouver, British Columbia, Canada, to Seattle, Washington (R.T. 49). Miss Harand testified that during the period from March 10, 1955, until the 19th of July, she resided at the New Star Rooms in Vancouver (R.T. 36-37). The witness, Harand, had been deported from Seattle, Washington, to Vancouver, B. C., on September 24, 1954, as an alien (R.T. 21, 124), and as such was not lawfully entitled to enter the United States on or about July 20, 1955 (R.T. 194).

Miss Harand testified that in early April 1955 she received a telephone call at the New Star Rooms from appellant Willie Bill Gant, alias Wiley Gant (R.T. 38-40), whose voice she recognized inasmuch as she had lived with him intermittently in Vancouver between October 1954 and March 1955 (R.T. 25). The call came from Yakima, Washington, and the appellant, Willie Bill Gant, alias Wiley Gant, said that he wanted her to come to the United States and further that there was quite a bit of money in Yakima (R.T. 40-41).

The victim, Harand, testified that she did not leave Vancouver following this conversation, and further that about two weeks later she again received

a phone call from the same appellant (R.T. 42). He inquired as to why she had not come to Yakima, and "told me to come down this week-end to Seattle" (R.T. 42).

In May of 1955, the witness, Harand, testified to receiving a call from appellant Ulysses Gant, alias Junior Gant (R.T. 43-44), in which Ulysses Gant told her "he was very anxious to meet me, and he didn't have a girl friend, and him and I could get rich" (R.T. 44). Miss Harand stated that she would try and come to the United States if she could get across the border, to which Ulysses Gant replied, "if I did it once I could do it again" (R.T. 45).

The victim, Martha Marie Rose Harand, next testified that during June 1955 she again received a phone call from Willie Bill Gant, alias Wiley Gant (R.T. 46), and that during the course of that call she spoke with both Willie and Ulysses Gant. With respect to the conversation with Willie Gant, the witness testified as follows:

"A. Well, he asked me why I didn't come down to Seattle.

"Q. What did you say?

"A. I told him I couldn't make it; and he told me, 'Well, last week-end was pay week-end,' and I should come down.

"Q. And what did you say?

"A. I told him, well, I would try and make it. He told me to take a bus." (R.T. 46)

With respect to what was said between herself and Ulysses Gant during the same phone conversation, the witness testified as follows:

"A. He told me he was very anxious to see me.

"Q. What did you say?

"A. I told him I would like to see him, too; and he said, 'Well, you get on a bus and come down'." (R.T. 47-48).

With regard to the period between October 1954 and March 10, 1955, Miss Harand testified that she operated as a prostitute in Vancouver, B. C., while residing with Willie Gant, and further, that her customers were procured by Willie Gant, and that her earnings thereby were given to Willie Gant (R.T. 33). During this same period, the witness, Harand, testified that she had the following conversation with appellant, Willie Gant:

"A. Willie asked me to come down to the States.

"Q. What did you say?

"A. I says I couldn't come down because I was deported.

"Q. What did Willie say?

"A. He said, 'I could find a way'." (R.T. 36)

Miss Harand added that she and Willie Gant discussed this same matter "quite a few times" (R.T. 36),

and also that she told Willie Gant that she was born in Saskatchewan (R.T. 38).

Other testimony relating to appellant Willie Bill Gant's knowledge of Martha Harand's alienage was provided by Charles Campbell, a detective sergeant in the Vancouver Police Department (R.T. 312-316). He testified that on March 9, 1955, he went to Room 2, 956 Main Street, Vancouver, B. C., which room was occupied by Willie Gant and the victim, and that he advised Willie Gant as follows:

"A. I told Willie Gant that Marsha Harand was seventeen years of age, and he made no reply.

"Marsha said that her mother knew where she was, and knew what she was doing; and I asked her where her mother was, and she stated in Regina. That was the course of the conversation." (R.T. 316).

The victim, Martha Harand, testified that she was called by the name of Marsha as well as Martha (R.T. 17).

With regard to the period from July 20, 1955, to October 12, 1955, Miss Harand testified that continuously throughout that period she lived in various hotels or houses in Seattle, Washington, with either Willie Bill Gant or Ulysses Gant or both, and that she operated as a prostitute during that entire period (R.T. 53-87). She further testified that both appellants procured customers for her throughout that

period, and that all of her earnings were turned over to one or the other of them (R.T. 53-87).

Records of various Seattle hotels were introduced into evidence (R.T. 167; 179; 253) corroborating the witness Harand's narrative of where she stayed and when during this 84-day period she was with one or the other of the appellants. Rooming house records were also introduced for this same purpose (R.T. 224).

Three members of the United States Army, John L. Wiggins (R.T. 198-210), William E. Johnson (R.T. 258-271), and William M. McNeil, Jr. (R.T. 272-290), all testified to being solicited by appellant, Willie Bill Gant, sometime between September 27 and September 30, 1955, for the purpose of coming with him and paying for an act of sexual intercourse. All three testified to accompanying him and of recognizing the victim, Martha Marie Rose Harand, as one of the two girls to whom they were taken, and Wiggins and Johnson additionally testified to having intercourse with Miss Harand on that occasion (R.T. 205; 265).

The witness, Miss Harand, further testified that during August 1955, while living with appellant Ulysses Gant, alias Junior Gant, at the Sun Hotel that she and he had the following conversation:

"A. I asked him if he would get me any papers.

"Q. What did he say?

"A. He said he would go down as soon as he could, and try and get some." (R.T. 63).

She further testified that Ulysses Gant soon thereafter brought her a birth certificate of another person (R.T. 64). Continuing thereafter concerning this birth certificate provided by appellant Ulysses Gant, Miss Harand testified:

"Q. What happened with regard to it?

"A. It was filled in, and he said he was going to erase it, and typewrite my name on it. He erased it and gave it to me.

"Q. And what did you do with it?

"A. I kept it until Willie had ripped it up." (R.T. 64)

Mr. Lawrence Augustine, Chief of Investigations for the Seattle District of the Immigration and Naturalization Service, produced and introduced into evidence the proper certification showing the non-filing, as of a date far beyond the 30-day period, of the record required in the charge as alleged in Count III (R.T. 135). The Court in instructions, and without exception, took judicial notice of Canada's participation in the arrangement of July 25, 1902, for the suppression of White Slave Traffic (R.T. 533).

During trial both appellants were represented by Mr. Robert M. Elias, an experienced trial lawyer with wide criminal trial familiarity. After trial, both appellants retained Mr. Theodore Locke, who repre-

sented them in all post trial motions, and at time of sentencing.

III. SUMMARY OF ARGUMENT

In the brief of both appellants, sections are labeled "Points Raised" and "Points Raised in Arguments", which sections correspond to specifications of error. Appellant Willie Bill Gant, alias Wiley Gant, sets forth two points, and appellant Ulysses Gant, alias Junior Gant, sets forth three points.

Upon consideration of these points and after careful reading of the arguments presented by each appellant, it appears that the only real contention raised by each is that there was insufficient evidence to convict. The Government takes the position that there was a wealth of evidence, both direct and circumstantial, which clearly supports the verdict.

IV. ARGUMENT

We have purposely attempted in our Statement of the Case to set out testimony and evidence of those matters which bear directly upon the various elements incumbent upon the Government to prove as to each appellant and on each count. These elements were included in the Court's charge to the jury, to which charge no exception was taken then, nor is any objection raised now.

As to Count I, the Government was required to prove that between March 10, 1955, and July 20, 1955, each appellant attempted to or did encourage and induce the named victim to come to Seattle, Washington, and that such encouragement and inducement was done wilfully, knowingly, and unlawfully. Further that during that period the victim was an alien not entitled to enter the United States, and that each appellant so knew (R.T. 528).

As to Count II, the Government was required to prove that between July 20, 1955, and October 12, 1955, each appellant did conceal, harbor, and shield or attempt to conceal, harbor, and shield the victim from immigration authorities and from observation to prevent her discovery as an alien. Also, that such conduct on the part of each appellant was done wilfully, knowingly, and unlawfully, and further that during the period involved the victim was an alien not entitled to reside within the United States, and that each appellant so knew (R.T. 529).

As to Count III, the Government was required to prove that the victim was an alien, that she entered the United States on or about July 20, 1955, from Canada, and that Canada was a party to the White Slave Traffic Suppression Act. Also, that within three years after the date of her entry, each appellant did

keep, maintain, control, and harbor her for purposes of prostitution, and that within thirty days after commencing so to do each appellant failed to file the statement required by law with the Commissioner of Immigration and Naturalization.

Without reiteration of the matters contained in our Statement of the Case, we respectfully submit that there is set out therein, not to mention all of the additional circumstantial matters disclosed by the full transcript, substantial evidence proving each element as to each appellant beyond all possible doubt.

There is of course direct evidence of actual verbal persuasion and inducement, as is shown by the language employed during the course of the various telephone conversations referred to in the Statement of the Case. There is, however, no direct evidence nor any actual showing of the physical concealing, harboring, or shielding of the victim herein. Because of this, the appellants may claim that there was a failure of proof as to Count II of the Indictment. In fact, appellants might argue that the very fact that the named alien female person engaged in acts of prostitution establishes quite pointedly that she was in the company of various members of the public at almost all times, and, arguably, such is completely inconsistent with any physical concealment or harboring.

In this regard, the law is clear that the statute involved concerns only the concealing, harboring, and shielding from the detection of immigration authorities, and in no sense refers to concealing, harboring, and shielding from ordinary members of the public. The case of *United States v. Smith* (C.A. 2, 1940), 112 F. 2d 83, 85, is exactly in point:

“That appellant harbored them cannot admit of doubt. True, the girls were permitted intercourse with certain members of the public, as is to be expected in their occupation. But ‘harbor’ in the context of the statute — ‘conceal or harbor * * * any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States’ — means only that the girls shall be sheltered from the immigration authorities and shielded from observation to prevent their discovery as aliens. *Susnjar v. United States*, 6 Cir., 27 F. 2d 223. This they certainly were.”

The question of the knowledge of each appellant as to the alienage of the named female alien is a matter which the Government was required to prove under the allegations of Count I and Count II. See *United States v. Mack* (C.A. 2, 1940), 112 F. 2d 290. It is for this reason that we have very carefully attempted to set forth the exact words used in the telephone conversations in order to show knowledge on the part of both appellants. Besides this, we, of course, have the evidence provided by Detective Sergeant Campbell and

by the victim herself regarding the knowledge which appellant Willie Bill Gant acquired during the period he resided with the victim in Vancouver prior to March 10, 1955.

Of similar significance, but with respect to the appellant Ulysses Gant, we have made reference to not only his actual language during the course of the phone conversations but also to what he said during the period that he and the victim were living together in Seattle, Washington.

V. CONCLUSION

As each appellant has been accorded a fair trial and has been convicted upon substantial evidence, we ask that the judgment be affirmed.

Respectfully submitted,

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No. 15220

**United States
Court of Appeals**
for the Ninth Circuit

GLEN EARL GRIGG,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Appellee.

Transcript of Record

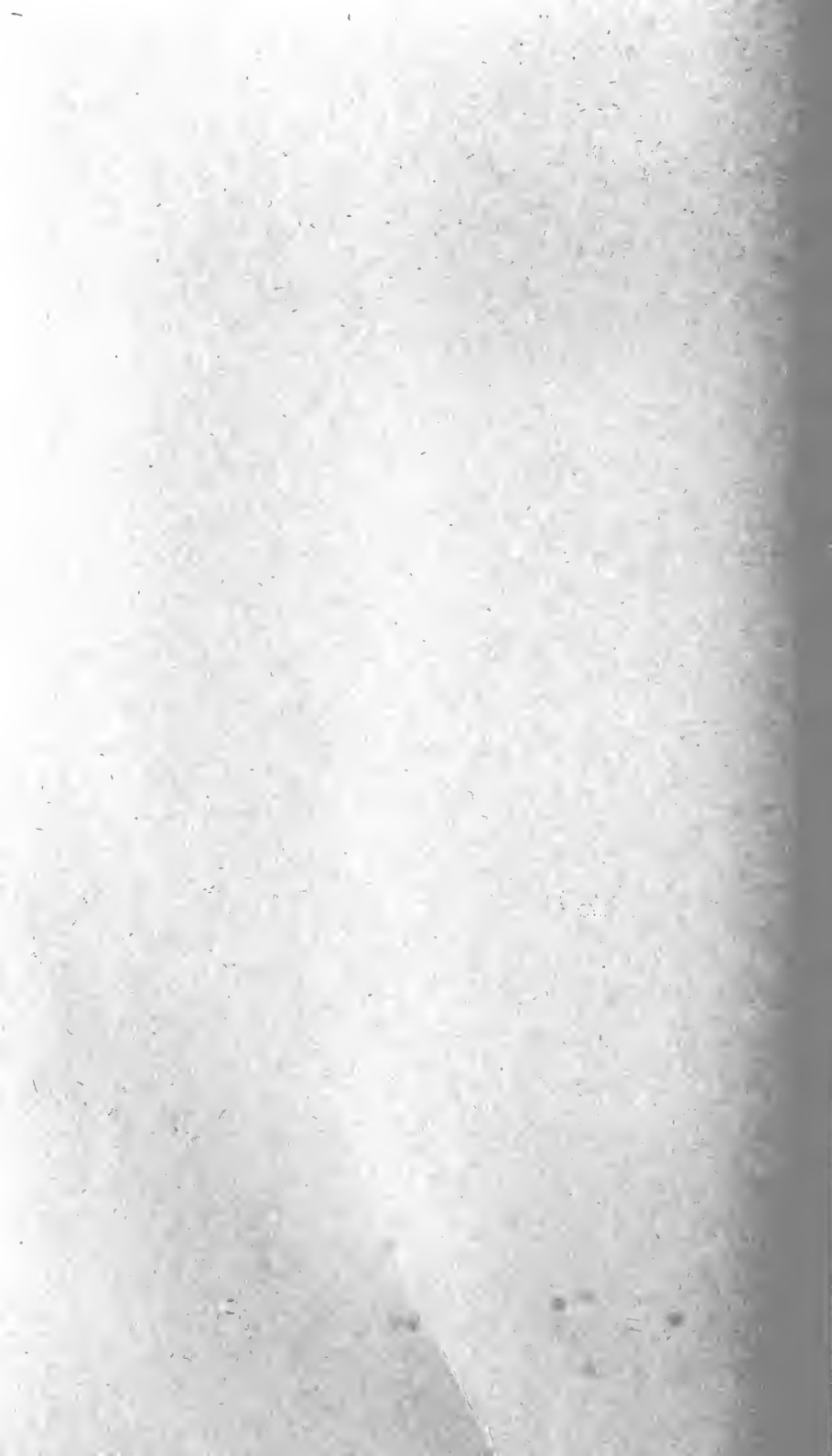
**Appeal from the United States District Court for the
Northern District of California,
Northern Division.**

FILED

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-30-56

DEC - 3 1956

PAUL P. O'BRIEN, CLERK



No. 15220

**United States
Court of Appeals**
for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the Northern
District of California, Northern Division

No. 7317

GLEN EARL GRIGG,

Plaintiff,

vs.

HARVER COON GENDEL, SOUTHERN PA-
CIFIC COMPANY, a Corporation, FIRST
DOE to SIXTH DOE, Inclusive,

Defendants.

Petition of Southern Pacific Company for Removal
of Civil Action From State Court to United
States District Court

To the United States District Court for the North-
ern District of California, Northern Division:

Your petitioner, Southern Pacific Company, a
corporation, petitioning to remove a civil action
brought in the State Court to the United States
District Court for the Northern District of Cali-
fornia, Northern Division, respectfully shows:

I.

On the 27th day of May, 1955, a civil action was
commenced in the Superior Court of the State of
California, in and for the County of Sacramento.
Said action was entitled and numbered on the files
of the Clerk of said Court as appears on the true
and correct copy of the complaint and summons
attached hereto as "Exhibit A." and is incorporated

herein as though fully set forth. The nature of said action appears from the copy of said complaint hereto attached. Said complaint names petitioner, Southern Pacific Company, a corporation, as a defendant. Process in said action was first served on petitioner, Southern Pacific Company, on June 6, 1955. Attached hereto, and marked "Exhibit B," is a true and correct copy of the answer of the petitioner, which constitutes all of the pleadings, motions, order or other papers in addition to the proceeding occurring in open Court, as is hereinafter specifically set forth, from which it was or could be first ascertained that the case is one which has become removable.

II.

Petitioner, Southern Pacific Company, at all times mentioned in said complaint was, and now is, a corporation duly created, organized, and existing under and by virtue of the laws of the State of Delaware, and of no other state, and was at all said times herein mentioned and is still a citizen and a resident of the State of Delaware.

III.

Plaintiff was at the time of commencement of said action, and ever since has been and now is, a citizen of the State of California, and a resident of the Northern District of said State, and non-resident of the State of Delaware.

IV.

Defendant Harver Coon Gendel is named in said complaint as a co-defendant with petitioner, South-

ern Pacific Company, a corporation, but has not been served with summons and complaint in said action and has not appeared voluntarily or at all therein. Defendants First Doe to Sixth Doe, inclusive, are also joined in said action, and Paragraph II of the complaint therein alleges as follows:

“Plaintiff does not know the true names of the defendants designated herein by the fictitious names of First Doe to Sixth Doe, inclusive, and plaintiff prays leave to substitute their true names when the same become known to him and to substitute appropriate charging allegations concerning said fictitiously designated persons.”

No persons have been served with summons and complaint in said action as any of the said fictitiously named defendants, and no person has appeared voluntarily or otherwise in said action sued by name of said fictitious names, nor has any defendant whatsoever appeared in said action at all excepting your petitioner, the defendant, Southern Pacific Company, a corporation.

V.

The above-entitled action is of a civil nature at law, over which the District Courts of the United States are given jurisdiction, brought for the recovery of Twenty-five Thousand Dollars (\$25,000.00) general damages for personal injuries, Fifteen Hundred Dollars (\$15,000.00) damages for injury to an

automobile, and an unstated amount of additional special damages in the nature of medical expenses, automobile towing service and lost use of the automobile, all claimed to have been caused when certain mules or horses, alleged to have been under the care and custody of petitioner, Southern Pacific Company, in the County of Yolo, State of California, strayed upon U. S. Highway 40 and into the path of plaintiff's car.

Petitioner wholly contests and denies the claim in the complaint. The amount in controversy in said action exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00), being of the sum of Twenty-five Thousand Dollars (\$25,000.00) general damages for personal injuries, Fifteen Hundred Dollars (\$1,500.00) damages for injury to an automobile, and an unstated amount of additional special damages in the nature of medical expenses, automobile towing service and lost use of the automobile.

VI.

On the 15th day of November, 1955, the said action came on for trial before the said Superior Court of the State of California, in and for the County of Sacramento, sitting without a jury, upon the plaintiff's complaint and the Answer of defendant, Southern Pacific Company, a corporation, and on said date the plaintiff, by counsel, voluntarily dismissed said action as to all defendants therein, except as to the defendant Southern Pacific Company, a Delaware corporation, petitioner herein.

From the time of and after the dismissal of said action as against all defendants therein except defendant Southern Pacific Company, petitioner herein, said action involved, and it ever since has involved and it still involves, a controversy wholly between citizens of different states which can be fully determined as between them, that is to say, between said plaintiff, a citizen and resident of the State of California, and a non-resident of the State of Delaware, and Southern Pacific Company, a corporation, defendant and petitioner herein, a citizen and resident of the State of Delaware and a non-resident of the State of California.

Upon the dismissal of said action as against all defendants except Southern Pacific Company, said action, which, prior and up to the time of said dismissal, had not been removable to a United States District Court, thereupon and for the first time and forthwith from the time of said dismissal became removable to the proper United States District Court upon the ground of the diverse citizenship of the plaintiff and of the defendant Southern Pacific Company, your petitioner. Thereupon, and promptly after said dismissal and before any other steps have, or any step has, been taken by your petitioner in said action, or in the defense thereof, your petitioner files this, its petition, for the removal of the cause to the proper Federal Court, viz: the United States District Court, in and for the Northern District of California, Northern Division.

VII.

Your petitioner files and offers herewith its bond with good and sufficient surety conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

VIII.

That said suit is now one of which the United States District Courts have original jurisdiction.

Wherefore, petitioner prays that this action be removed from said State Court into the United States District Court for the Northern District of California, Northern Division, and that no other or further proceeding be had in this action in said State Court, and for such other, further and different relief as to the Court may seem proper.

/s/ HORACE B. WULFF,

DEVLIN, DIEPENBROCK
& WULFF,

Attorneys for Defendant
Southern Pacific Company.

Duly verified.

EXHIBIT A

In the Superior Court of the State of California,
in and for the County of Sacramento

No. 100994

GLEN EARL GRIGG,

Plaintiff,

vs.

HARVER COON GENDEL, SOUTHERN PA-
CIFIC COMPANY, a Corporation, FIRST
DOE to SIXTH DOE, Inclusive,

Defendants.

COMPLAINT FOR DAMAGES
(Property Damage & Personal Injury)

The plaintiff complains of defendants, and for
causes of action alleges:

I.

That at all times mentioned herein the defendant,
Southern Pacific Company, was and now is a cor-
poration organized and existing under and by virtue
of the laws of the State of Delaware, and doing busi-
ness in the State of California, and other states, and
at all times herein mentioned, and now is, engaged in
the business of a common carrier by railroad in
interstate commerce in the State of California and
other states. That the defendant, Harver Coon Gen-
del, is a resident and domiciled in the State of Cali-
fornia.

II.

Plaintiff does not know the true names of the

defendants designated herein by the fictitious names of First Doe to Sixth Doe, inclusive, and plaintiff prays leave to substitute their true names when the same become known to him and to substitute appropriate charging allegations concerning said fictitiously designated persons.

III.

That at all times mentioned herein, the said defendant, Southern Pacific Company, owned, operated and maintained railroad lines in and about the City of Sacramento and warehouses, corrals and appurtenant properties and facilities, used in the operation in said railroad by said defendant. That at all times mentioned herein Park Overpass was and is a part of U. S. Highway 40, running in a generally easterly and westerly direction and is located approximately one mile west of Sacramento, California.

IV.

That on or about Friday, December 17, 1954, at or about the hour of 6:15 o'clock p.m. of said day, the plaintiff, Glen Earl Grigg, was operating a 1955 Cadillac automobile sedan, license No. California 2X10758, which automobile was owned by said plaintiff, in a generally easterly direction on the said Park Overpass, U. S. Highway 40, about one mile west of Sacramento, California, and that said plaintiff was proceeding on said highway east towards Sacramento, California.

V.

That on or about the said 17th day of December,

1954, at about the hour of 6:15 o'clock p.m., the said defendants, and each of them, owned, possessed and controlled, and has in their sole care and custody certain mules or horses in the immediate vicinity of said Park Overpass, U. S. Highway 40, approximately one mile west of Sacramento, California, and were so negligent, careless and reckless in their said care, custody and control, ownership and maintenance of said horses and mules as to allow said animals to stray or come upon the said Park Overpass on U. S. Highway 40 and into and upon the main traveled portion of said highway, and into the path of the plaintiff's oncoming car, and that at said time and place, the car of plaintiff was caused to be struck by one or more of said horses or mules with great force and violence, severely damaging the automobile of plaintiff and causing plaintiff to sustain the personal injuries hereinafter set forth.

VI.

That by reason of said wrongful, careless and negligent acts, omissions and conduct of the defendants, and each of them, and their agents, servants and employees, and as a direct and proximate result thereof, plaintiff sustained the following injuries, to wit:

Severe lacerations of his right index and middle fingers and a contusion to the right occipital region of plaintiff's scalp and contusions and abrasions to the left scalp of plaintiff's thorax anteriolaterally; contusions and abrasions to the right hand with fracture of a bony deformity in the right hand; and

contusion to the pelvis and injury to the left hip joint located generally in the femoral triangle region continuing back to the buttock, and severe mental shock, pain and suffering, together with multiple contusions, lacerations and abrasions in and about and upon the body of said plaintiff, all of which rendered the plaintiff sick, sore, lame and disabled, and that he will suffer permanent injuries and disfigurement as a result thereof, and that by reason thereof, plaintiff has been damaged in the sum of Twenty-Five Thousand Dollars (\$25,000.00).

VII.

That as a direct and proximate result of the said negligence and carelessness of the defendants as above alleged, and the injuries suffered therefrom, it was necessary that the plaintiff be hospitalized and plaintiff is required to, and did obtain the services of physicians and surgeons, nurses, hospital and medical care and will be required to expend further sums for the same in the future; that the amount thereof is not now known to plaintiff, and plaintiff prays leave to amend this complaint when the sums so expended are ascertained.

VIII.

That further, as a direct and proximate result of the said negligence and carelessness of the defendants, as above alleged, and the damages sustained to plaintiff's 1955 Cadillac sedan automobile, plaintiff has been caused to expend sums of money to repair

said automobile, and by virtue of said damage to said automobile, the same has depreciated in value and plaintiff has therefore been damaged in the sum of Fifteen Hundred Dollars (\$1500.00) by virtue of the costs of said repairs and the depreciation in value of said automobile as aforesaid.

IX.

That further, as a direct and proximate result of said negligence and carelessness of defendants as above alleged, plaintiff was caused to become obligated to pay the expenses of towing his automobile so as to remove same from the place of accident to the repair shop and for the loss of use of said automobile, causing him to disburse sums of money to secure the use of another car while his automobile was being repaired, the exact of which expenses are presently unknown to the plaintiff who prays leave of this Court to insert the said sum at this place when the same becomes known to plaintiff.

Wherefore, plaintiff prays judgment against defendants, and each of them, for the sum of Twenty-Five Thousand Dollars (\$25,000.00) General Damages, for the sum of Fifteen Hundred Dollars (\$1500.00) Special Damages represented by the damage done to plaintiff's automobile, and for such other special damages and sums of money plaintiff shall expend for medical care, including doctors, nurses, hospital, ambulance, X-rays, and for his cost of tow service and loss of use of automobile during the period it was being repaired, and for such other and

further and different relief as to the Court may seem just and equitable in the premises.

BARNETT & ROBERTSON,
/s/ RODNEY H. ROBERTSON,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed May 27, 1955.

EXHIBIT B

In the Superior Court of the State of California,
In and for the County of Sacramento

No. 100994

GLEN EARL GRIGG,

Plaintiff,

vs.

HARVER COON GENDEL, SOUTHERN PACIFIC COMPANY, a Corporation, FIRST DOE to SIXTH DOE, Inclusive,

Defendants.

ANSWER

Comes now defendant Southern Pacific Company, a corporation, and answering the complaint of plaintiff, admits, denies and alleges as follows:

I.

Answering Paragraphs V, VI, VII, VIII and IX, defendant denies each and every, all and singu-

lar, the allegations thereof and specifically denies that by reason of the alleged or any carelessness or negligence of this defendant, plaintiff has been damaged in the amount alleged or any amount whatsoever or at all.

As and for a Second, Further and Separate Defense to the Complaint of Plaintiff on File Herein, and Without Prejudice to the Defense Hereinabove Set Forth, this Defendant Avers:

That at the time and place mentioned in said complaint, plaintiff so negligently and carelessly drove the said 1955 Cadillac automobile in a general easterly direction along the alleged Park Overpass, U. S. Highway No. 40 and into one or more mules or horses on said Overpass without exercising any care, caution or prudence in the premises, and that if said plaintiff had exercised any care, caution or prudence, he would have seen said mules or horses and would have avoided the alleged collision and any damages or injuries suffered by him, and that his damages and/or injuries, if any, were proximately caused and contributed to by said negligence and carelessness of plaintiff.

Dated: June 28, 1955.

DEVLIN, DIEPENBROCK &
WULFF,

Attorneys for Defendant Southern Pacific Company,
a Corporation.

Duly verified.

[Endorsed]: Filed November 15, 1955.

[Title of District Court and Cause.]

MOTION TO REMAND CIVIL ACTION

The plaintiff, Glen Earl Grigg, moves the Court to Remand the above-entitled cause to the Superior Court of the State of California, In and For the County of Sacramento, on the following grounds:

I.

That the United States District Court has no jurisdiction to hear and determine the above-entitled cause.

II.

That the defendant, Southern Pacific Company, submitted itself to the jurisdiction of the Superior Court of the State of California, In and For the County of Sacramento, and has thereby irrevocably elected to proceed to trial in the aforesaid court and has waived its right to trial in the United States District Court.

III.

That if defendant, Southern Pacific Company, has not waived its right to Petition for Removal, its petition was premature in that plaintiff had not made his final election to proceed in the State Court since no dismissal had been entered against the defendants, First Doe to Sixth Doe, inclusive, and the trial of the cause in the State Court had not yet commenced.

Wherefore, plaintiff, Glen Earl Grigg, moves the above-entitled Court for its order remanding the

above-entitled cause to the Superior Court of the State of California, In and For the County of Sacramento, together with its order for his costs incurred thereby.

Dated: November 28th, 1955.

BARNETT & ROBERTSON,
CHARLES J. MILLER,

Attorneys for Plaintiff;

/s/ RODNEY H. ROBERTSON.

Affidavit of service by mail attached.

[Endorsed]: Filed November 29, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION TO
REMAND CAUSE

To the defendant, Southern Pacific Company, and
to Devlin, Diepenbrock & Wulff, its attorneys:

You, and Each of You, Will Please Take Notice and you are hereby notified that on the 5th day of December, 1955, at the hour of 10:00 o'clock a.m., in the above-entitled Court, before the Honorable Sher-rill Halbert, Judge thereof, at the Courtroom of said Court located at Federal Post Office, Sacramento, California, the plaintiff, Glen Earl Grigg, will move the above-entitled Court for its order remanding said action to the Superior Court of the State of California, In and For the County of Sacramento,

and for his costs incurred thereby, upon the grounds that the above-entitled Court is without jurisdiction to hear and determine said action and upon the further grounds that the defendant, Southern Pacific Company failed to Petition to Remove said cause within the time required by law, has submitted itself to the jurisdiction of the Superior Court of the State of California, In and For the County of Sacramento and has waived its right to trial in the United States District Court thereby.

This Motion will be based upon the grounds above specified and upon the Answer to Petition for Removal filed herein, and upon the affidavits of counsel for plaintiff filed herewith, and upon the transcript of proceedings annexed as Exhibit "A" to plaintiff's Answer, filed herein, and upon the Points and Authorities filed herewith, and upon all the records, files, pleadings and documents on file in this action.

Dated: November 28th, 1955.

BARNETT & ROBERTSON,
CHARLES J. MILLER;

/s/ RODNEY H. ROBERTSON,
Attorneys for Plaintiff.

MEMORANDUM OF POINTS AND AUTHORITIES

Memorandum of Points and Authorities will be filed on December 1, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF COUNSEL IN SUPPORT
OF MOTION TO REMAND

State of California,
County of Sacramento—ss.

Charles J. Miller, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above-entitled matter, and makes this affidavit as such; that since July of 1955, he has carried on numerous conversations with Mr. John Diepenbrock, one of the attorneys for Southern Pacific Company, with regard to the above matter; that your affiant has also entered into numerous stipulations with Mr. Diepenbrock concerning the above matter, as follows:

July 13, 1955: Oral stipulation that August 5, 1955, be a satisfactory date for taking depositions of Mr. Perine and Mr. Fisher, employees of defendant Southern Pacific Company;

July 20, 1955: Oral stipulation that depositions of Perine and Fisher be postponed to August 23, 1955, in order to avoid any interference with Mr. Fisher's vacation;

September 15, 1955: Oral stipulation that defendant Southern Pacific Company take deposition of the plaintiff on September 27, 1955, and oral stipulation that plaintiff be subjected to physical examination by defendant on the same date;

November 3, 1955: Written stipulation that deposition of Dr. Henning be taken in San Francisco, on November 11, 1955;

November 11, 1955: At the taking of the aforesaid deposition, Mr. Diepenbrock stipulated with Mr. Robertson that the deposition could be read into evidence without being signed by Dr. Henning. At this time Mr. Diepenbrock requested, and was given, X-rays of Mr. Grigg's hip, so that he could show said X-rays to the physician for Southern Pacific Company prior to the trial on November 15, 1955;

November 14, 1955: In the late afternoon of the day before the trial, Mr. Diepenbrock called at the office of your affiant for the purpose of examining certain exhibits plaintiff proposed to offer into evidence. Mr. Diepenbrock was permitted to examine these exhibits for the purpose of agreeing upon a stipulation that the exhibits might be admitted into evidence. After examining the said exhibits, Mr. Diepenbrock entered into an oral stipulation that the said exhibits might be admitted into evidence at the trial the following day;

That upon numerous occasions throughout the above period your affiant informed Mr. Diepenbrock that plaintiff has been unable to serve Harver Coon Gendel with summons and complaint; your affiant asked Mr. Diepenbrock if his office knew the whereabouts of Mr. Gendel and was told that Mr. Diepenbrock had no knowledge of Mr. Gendel's where-

abouts; that more than thirty days prior to the trial of the above matter, your affiant again told Mr. Diepenbrock of plaintiff's inability to locate Mr. Gendel, and told him that plaintiff would dismiss without prejudice as to Mr. Gendel and proceed to trial against Southern Pacific Company alone; that Mr. Diepenbrock, by his actions and conduct led your affiant to believe that defendant Southern Pacific Company was agreeable to a trial in the Superior Court despite the commitment of plaintiff to proceed against Southern Pacific Company alone; that by said tactics Mr. Diepenbrock obtained possession of certain X-rays and was permitted to examine certain other exhibits of plaintiff; that had your affiant known of the concealed intent of Mr. Diepenbrock to petition for removal to Federal Court upon the day of trial, your affiant would not have permitted Mr. Diepenbrock to obtain possession of said X-rays or examine said other exhibits.

That at the time Southern Pacific Company filed its petition for removal the trial of the above-entitled matter and not as yet commenced; that when said petition was filed, your affiant was arguing a motion to amend the plaintiff's complaint, which motion had been noticed for hearing on the trial date;

That subsequent to the filing of the Complaint, your affiant made an investigation for the purpose of learning the whereabouts of Mr. Gendel; that your affiant states, upon information and belief, that Mr. Gendel was not, at the time of the commence-

ment of the action, a citizen of the State of California; that said information was equally available to defendant Southern Pacific Company;

That your affiant has now determined that Anthony Perine and Sigmund A. Fisher are two of the persons named as Doe defendants in the complaint of plaintiff; that both Perine and Fisher are citizens of the State of California;

That plaintiff has incurred the following costs as a result of the filing of the petition for removal to Federal Court:

Travel and meals for Mr. Grigg and Mr.

Robertson (estimated)	\$ 50.00
Hotel accommodations for Mr. Grigg.....	8.14
Hotel accommodations for Mr. Robertson...	9.75
One day's attorney fees—Mr. Miller and Mr.	
Robertson	\$200.00
Transcript of proceedings before Superior	
Court on November 15, 1955.....	27.20
Certification of Exhibits to Answer.....	4.05
Estimated charge for lost time—expert wit-	
ness	40.00
Witness fees paid.....	26.50
Service of subpoenas.....	15.20
Long distance telephone calls to out-of-town	
witnesses (estimated)	1.32
<hr/>	
Total	\$382.16

/s/ CHARLES J. MILLER.

Subscribed and sworn to before me this 29th day of November, 1955.

[Seal] /s/ [Illegible],

Notary Public in and for Said
County and State.

Affidavit of service by mail attached.

[Endorsed]: Filed November 29, 1955.

[Title of District Court and Cause.]

ANSWER TO PETITION OF SOUTHERN PA-
CIFIC COMPANY FOR REMOVAL OF
CAUSE

Comes now the plaintiff, Glen Earl Grigg, and for his Answer to Petition of Southern Pacific Company for Removal of Civil Action from State Court to United States District Court, admits, denies or alleges as follows:

I.

Admits the allegations of Paragraphs I, II, III and IV of defendant's Petition for Removal.

II.

Admits the allegations contained in Paragraph V of said Petition for Removal excepting the allegations commencing with the word "all" at line 21, page 3, and ending with the words "Pacific Company," line 23, page 3. In this regard, plaintiff, Glen Earl Grigg, alleged in his complaint (Exhibit A to the Petition), Paragraph V thereof as follows:

“That on or about the 17th day of December, 1954, at about the hour of 6:15 o’clock p.m., the said defendants, and each of them, owned, possessed and controlled and had in their sole care and custody certain mules and horses * * *”
(Emphasis added.)

III.

Answering Paragraph VI of said Petition for Removal, the plaintiff denies that on November 15, 1955, by his counsel that he dismissed his action “as to all defendants therein, except as to the defendant Southern Pacific Company” and in this regard allege that plaintiff’s counsel dismissed said action without prejudice solely against the defendant, Harver Coon Gendel. There is attached hereto and marked Exhibit “A” a copy of the transcript of proceedings had before the Superior Court in said action on November 15, 1955.

This answering plaintiff denies that the said action had not been removable prior to the dismissal of Harver Coon Gendel but avers that said action was subject to a Petition of Removal from the date of service of process on defendant, Southern Pacific Company, on June 6, 1955, in that there was no allegation of said complaint of plaintiff barring the filing of a Petition for Removal at the aforesaid date.

Plaintiff avers that the Complaint does not plead the citizenship of the parties so as to bar the filing of a Petition for Removal on defendant’s part and that therefore, in failing to Petition for Removal within the statutory period following service of

process, the said Petitioner, Southern Pacific Company, has irrevocably waived such right to file said Petition.

IV.

This answering plaintiff admits the allegations of Paragraph VII of the Petition for Removal.

V.

This answering plaintiff denies the allegations of Paragraph VIII of the Petition for Removal and does hereby incorporate herein by reference the allegations of Paragraph IV of this Answer as though set forth in full herein.

Wherefore, this answering plaintiff prays that the Petition for Removal be denied and that plaintiff's Motion to Remand, filed simultaneously herewith, be granted and that the plaintiff, Glen Earl Grigg, be awarded his costs incurred herein.

BARNETT & ROBERTSON,
CHARLES J. MILLER,
Attorneys for Plaintiff,

/s/ RODNEY H. ROBERTSON.

State of California,
City and County of San Francisco—ss.

Rodney H. Robertson, being first duly sworn, deposes and says:

He is an attorney at law and one of the attorneys for Glen Earl Grigg, the plaintiff in the within en-

titled proceeding; that affiant has charge of the said proceeding on behalf of said plaintiff and that he has read the foregoing Answer to Petition and knows the contents thereof, and that the same is true of his own knowledge except as to such matters that are therein stated upon his information or belief, and as to those matters that he believes it to be true.

That affiant makes this verification on behalf of plaintiff for the reason that said plaintiff is absent from the City and County of San Francisco.

/s/ RODNEY H. ROBERTSON.

Subscribed and sworn to before me this 21st day of November, 1955.

[Seal] /s/ ETTA T. BURNS,
Notary Public in and for the City and County of
San Francisco, State of California.

EXHIBIT A

In the Superior Court of the State of California,
In and for the County of Sacramento
Department Number Four

No. 100994

GLEN EARL GRIGG,

Plaintiff,

vs.

HARVER COON GENDEL, SOUTHERN PACIFIC COMPANY, a Corporation,

Defendants.

Hon. Jay L. Henry, Judge.

Tuesday, November 15, 1955

REPORTER'S TRANSCRIPT OF PROCEEDINGS
HAD AT TRIAL OF ABOVE-ENTITLED ACTION

Appearances:

For the Plaintiff:

CHARLES J. MILLER, ESQ.,
BARNETT & ROBERTSON,
RODNEY H. ROBERTSON, ESQ.

For Defendant Southern Pacific Company:

DEVLIN, DIEPENBROCK & WULFF,
HORACE B. WULFF, ESQ.,
JOHN V. DIEPENBROCK, ESQ.,

The above-entitled cause came on regularly this day before Hon. J. L. Henry, Judge of the Superior Court of the State of California, in and for the County of Sacramento. The plaintiff was represented by Charles J. Miller, Esq., and Rodney H. Roberston, Esq. The defendant, Southern Pacific Company, was represented by Horace B. Wulff, Esq., and John V. Diepenbrock, Esq. The following proceedings were had, to wit:

The Court: Grigg vs. Gendel and Southern Pacific Company.

Mr. Miller: Your Honor, I am one of the attorneys appearing for Mr. Grigg. Mr. Robertson and Mr. Grigg should be here momentarily.

The Court: They are not here yet?

Mr. Miller: They are not here as yet and I would like a slight delay until they arrive.

The Court: Very well.

Mr. Miller: Perhaps we could dispose of a motion that we have to amend our complaint to increase the general damages to \$70,000 from \$25,000 and the motion is noticed for this morning.

The basis of the motion is affidavit of counsel that at the time the original complaint was filed we were not aware of the extent of Mr. Grigg's injuries and the degree to which the injuries would cause permanent disability and as a matter of fact, we only received that report on October 27, 1955, as is shown by the letter of Dr. Henning attached to the affidavit as an exhibit.

The Court: I don't see any of those papers in the file here.

Mr. Miller: They were filed, they must be in Department Two because I did file them.

The Court: Were you served?

Mr. Wulff: We were served, yes, if your Honor please, a notice of proposed amendment and affidavit of counsel.

The Court: When were you served?

Mr. Wulff: I can't answer that.

Mr. Miller: The affidavit of service by mail, I think, will show that; I think it was mailed out last week sometime.

Mr. Wulff: It was mailed in San Francisco.

Mr. Miller: No, in Sacramento.

Mr. Wulff: On the 10th of November.

The Court: Is there any objection to filing this or granting this motion?

Mr. Wulff: We are not going to agree to any amendment to increase the prayer but we have nothing to submit in opposition thereto.

The Court: Why all this delay? Why on the eve of the trial do you make these motions?

Mr. Miller: I believe the evidence will show that there is an X-ray taken the latter part of October.

The Court: Why wasn't it taken sooner?

Mr. Miller: Well, there was an X-ray taken in September that was not satisfactory, the X-ray was taken again in the latter part of October and on the basis of that X-ray we received a new report from the doctor which changed the picture quite a bit and in which the doctor stated that it was his opin-

ion that the injuries would cause severe permanent disability and he saw little hope in surgery correcting the condition and upon that basis we felt that the prayer as originally placed on file was inadequate and for that purpose it was necessary to file the motion to amend the complaint.

I believe that notice of motion must be in Department Two because it was filed there.

The Court: Well, it is not in this file.

You gentlemen are appearing for the defendant, the Southern Pacific Company?

Mr. Wulff: That is right, your Honor.

The Court: Who is representing Mr. Gendel?

Mr. Miller: I am Mr. Miller of Sacramento and this is Mr. Robertson of the firm of Barnett & Robertson of San Francisco, sitting on my left.

The Court: I mean the defendant Harver Coon Gendel.

Mr. Miller: He was not served, your Honor.

The Court: Was he served with a notice of your motion?

Mr. Miller: He was not served at all, your Honor; we have been unable to locate him. We have made numerous efforts to serve him with process but they have been to no avail.

The Court: What are you doing with respect to him?

Mr. Miller: With respect to him, we would at this time ask to dismiss without prejudice.

The Court: Well, very well. You make that motion, do you?

Mr. Miller: Yes, your Honor.

The Court: That will be granted.

Mr. Wulff: Under those circumstances the case now becomes removable to the Federal Court and we are now in the process of taking steps to remove it to the Federal Court on the ground there is a diversified citizenship now between plaintiff and the defendant, remaining defendant, Southern Pacific Company, and consequently it becomes removable under the Federal law now on the filing of our petition in the Federal Court and serving a notice thereof upon both the plaintiff and the Clerk of this Court.

Now, that is in process of being done and when that service is had this Court loses all jurisdiction to proceed.

There is no controversy under the law because this is a dismissal of the action and now the only action left is the action between the plaintiff and the one defendant, Southern Pacific Company, under the purely voluntary dismissal by the plaintiff of the other defendant and the case will be removed and we are making the necessary moves as promptly as possible, as soon as the removability feature appears we take proper steps and there is nothing to do now until the petition is filed and it is being filed now and will be given a number and when it is served on the Clerk and the plaintiff the Court loses all jurisdiction.

The Court: I take it that the case is out of our hands.

Mr. Wulff: That is correct.

Mr. Miller: We will contest the removal to the

Federal Court, your Honor, it places us in rather a difficult position.

Mr. Robertson: If it please the Court, I am Mr. Robertson, one of the attorneys for the plaintiff and I would object to removal on the grounds that there is no jurisdiction to remove this case at this time for the simple reason that the defendant, Southern Pacific Company, has already filed a general appearance in this case and has submitted itself to the jurisdiction of this Court.

In order to remove a case you must petition and remove to the Federal Court prior to appearing. They have submitted to the jurisdiction of this Court and therefore the jurisdiction of this Court attaches to this defendant and they cannot at this late date move to remove the case from the jurisdiction to which they have already submitted.

They are doing business in the State and have submitted to the Court's jurisdiction by entry of answer in this case and have taken depositions under the order of this Court in this case and have therefore submitted themselves to the jurisdiction of this Court and therefore they are not entitled to remove and I respectfully submit to your Honor we should proceed here.

Mr. Wulff: If your Honor please, let the record show we have filed copy of petition and bond together with notice of removal and have served them on counsel for the plaintiff and a copy thereof served or lodged with the Clerk of this Court so therefore under paragraph 1446 of Title 28 U.S.C.A., subdivision E reads promptly after filing of said pe-

tion and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the Clerk of such State Court, which shall effect the removal and the State Court shall proceed no further unless and until the case is remanded.

If there is any defects in jurisdiction, they have to be heard by way of motion to remand in the Federal Court because it is only the Federal Court that can test its own jurisdiction because this Court has lost jurisdiction by the removal proceedings, whether they are rightly or wrongly taken.

The disposes of the argument by counsel because this Court has no jurisdiction to test the jurisdiction of the Federal Court, but, irrespective of that, if the Court is interested, the case of *Southern Pacific Company vs. Haight*, arising from our own Court, appearing in 126 Federal 2nd, 900, that precise question was before the Court and in that case Haight sued the Southern Pacific Company and a group of crew members involved in a crossing case, but only the Southern Pacific Company was served and the resident or individual defendants were not served and the plaintiff announced in that case her readiness to proceed to trial against the Southern Pacific Company alone and the Court there held that constituted a severance of the cause of action. In this case, a very similar incident happened in that the plaintiff announced their intention to proceed against the non-resident defendant after first dismissing against the other defendant and con-

sequently there is left a case between the plaintiff and the non-resident defendant alone.

In the Haight case they raised the precise point that counsel has raised here and reading now from the decision, the question arises as to whether or not the petition for removal was timely. The petition was filed under the same circumstances as filed here and the plaintiff argued in the District Court, seeking to remand, that the petition, if proper at all, should have been made prior to the defendant's answer to the complaint or at least immediately after service of the memorandum to set the case for trial. In other words, we didn't file prior to the filing of the action or in the twenty day period and the Court there held that however the fact that the plaintiff set the case for trial, the fact that the resident defendant was not served and did not appear at the time set for trial would not of necessity be known to the non-resident defendant and therefore his right to remove could not be denied because he did not move for the severance upon being served with notice of setting the case for trial. However, the fact that plaintiff had the case set for trial, knowing that the resident defendant had not been served, and appeared in Court with such knowledge and announced that she was ready for trial is conclusive evidence that she regarded the action as severed and negatives the idea that she had not definitely determined upon her course and acted upon such determination instead of having inadvertently placed her case in a position subject to removal and therefore subject to withdrawal with the

Court's permission of her petition and consent to proceed.

In that case the Court held that the first time the case became removal the attorneys for the defendant proceeded promptly.

Mr. Miller: With regard to that, I have discussed, and am willing to be sworn and state under oath, that I have discussed the matter with Mr. Jack Diepenbrock for the defendant concerning service of summons and complaint upon Mr. Gendel and I have asked him on numerous occasions if he knew the whereabouts of Mr. Gendel and informed him we have been unable to serve Mr. Gendel and we were making every possible effort to effect service upon him.

Within thirty days prior to this trial date I stated to Mr. Diepenbrock that it would be impossible for us to serve Mr. Gendel, the defendant and stated at that time and that has been within the last thirty days at that time that at the time of the trial we would dismiss without prejudice as to Mr. Gendel.

It became apparent at that time, more than thirty days, almost thirty days ago, that Mr. Gendel would not be a defendant at this trial and I submit that if the motion was to be made it should have been filed and made at that time because they were aware of the fact that Mr. Gendel could not be served, they were informed by my office, by me personally that Mr. Gendel had not been served and we would dismiss without prejudice to him.

I submit that the motion at this time is most untimely and is pursued only for the purpose of delaying this trial.

Mr. Wulff: I think counsel does not understand the removability law and statutes relative thereto. They are rather technical and let me state to counsel that this is his voluntary action of dismissing, in other words, he said he was going to dismiss but until he did there was no controversy existing only between the two parties of diversified citizenship.

Section 1446, subdivision B expressly provides that if the case stated by the initial pleading was not removable, and that is our case here because he had a joint tort alleged, the defendants being a resident and non-resident charged in the pleadings, the case stated by the original pleading is not removable, a petition may be served within twenty days after receipt of copy of amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which has become removable.

By the Court making this order upon their voluntary solicitation of dismissal the case became removable and nothing that happened before, advising us that they might do it is immaterial because for example here is a case in 114 Federal Supplement at page 659 where they advised they were going to go ahead with the trial against the non-resident only and wrote a letter to the defendant's attorney advising them of that and they held that there was no severance because they still had the right to serve the defendant or do anything they wanted.

It is the actual act that makes the cause remov-

able, that gives us the right to remove and the act occurred here within the last ten minutes.

Mr. Miller: May I ask the Court, if there is any other alternative when the defendant Mr. Gendel is not served but for us to dismiss the action against him. I submit and have argued already that this is a motion, a most apparent delaying tactic that the attorneys for the Southern Pacific are pursuing, they have taken deposition, they took a deposition as recently as last Friday, I believe it was, November 11th, took the deposition in San Francisco on that date and they have come right up to the moment of trial and we have all our witnesses subpoenaed, we have made arrangements for doctors to testify and on the morning of the trial for the first time they indicate their desire to transfer the matter to the Federal Court.

The Court: According to the authorities they have cited here, that is the first opportunity they have had to make such a motion.

Mr. Miller: I think they had the opportunity to make the motion when it became apparent that Mr. Gendel could not be in this trial.

The Court: Not according to the cases. I haven't read those cases but if counsel is reading them correctly and I assume he is, the motion will be premature until the action was finally dismissed as to the resident defendant.

Mr. Wulff: That is correct, your Honor, the dismissal created the removability and we acted promptly upon it. We have that right to remove if we elect to exercise it.

The Court: You have filed these papers, have you?

Mr. Wulff: Yes, your Honor.

Mr. Miller: Your Honor, inasmuch as we have not dismissed as to any of the Does, First Doe to the Sixth Doe, we request that the matter be put over for thirty days for the purpose of allowing us to serve summons by substitute process upon parties who are at the present time unknown.

The Court: Apparently I have lost jurisdiction.

Mr. Miller: There is no order here transferring it to the Federal Court.

Mr. Wulff: You don't do it that way.

The Court: Under the new procedure it goes up automatically.

Mr. Wulff: That is right.

The Court: And then you make a motion to **re-mand**.

Mr. Robertson: I understand that procedure, however, I might point out that they have based their entire petition on the ground there is now a diversity, based upon a dismissal of the defendant Gendel, however, there are citizen defendants in the case, First Doe through Sixth Doe and the fact is Mr. Gendel, who has been closely connected with the Southern Pacific Company, has been reported living in Arizona and wilfully avoiding service and it is our contention since there are still Doe defendants in the case against which we have made no motion to dismiss their motion is not proper. If your Honor were to say the mere filing of a petition to remove divests the Court of jurisdiction in every

case, the Court could be divested on that basis the day of trial, however, I think your Honor that the motion must be shown on its face to be a correct motion and here there are still other defendants in the case against whom no motion has been made, therefore we would be entitled, your Honor would still have jurisdiction and we would be entitled to a reasonable period of time in view of this prize condition, to go forward and effect substitute service on this defendant through the processes provided by law.

The Court: You don't allege these John Doe defendants are residents any place, you only allege this defendant Gendel, and these defendants are fictitious defendants and are sued under these fictitious names and there are no charging allegations against the Does.

Mr. Robertson: Under the circumstances, if your Honor feels you have been divested of jurisdiction temporarily by the motion, it would be incumbent upon us, if your Honor feels this petition is valid even though there are defendants in the action, that we go forward to the Federal Court and make the normal petitions and take such steps as we deem advisable.

The Court: I feel under the circumstances I haven't anything else to do.

Mr. Wulff: That is correct.

The Court: But order the case off the calendar and you gentlemen can make your motion to remand.

I think it ought to be understood, I haven't ruled

on this motion to increase the prayer of their complaint——

Mr. Wulff: The Court has lost jurisdiction now.

Mr. Robertson: Well, your Honor, at this time, in order to make a clear record in this case, the plaintiff will request to be relieved of its dismissal of the defendant Harver Coon Gendel, without prejudice, on the grounds of surprise in view of the conduct of the defendant and we will move at this time formally to be relieved of our motion.

Mr. Wulff: The Court can't pass on any motion at all.

Mr. Robertson: I want to make that for the record.

The Court: I would like the record to show that the decision is reserved on the motion to amend the complaint by increasing the prayer. I think they are entitled to have that granted ultimately, either here or in the Federal Court.

Mr. Wulff: The Federal Court has full power to amend pleadings.

The Court: I think the ruling on that should be reserved. I didn't rule one way or the other.

Mr. Robertson: You know eventually your motion is not going to be upheld in the Federal Court; it will be remanded.

Mr. Wulff: If you can do it that is your privilege.

The Court: That is your next step.

Certificate of Court Reporter

State of California,
County of Sacramento—ss.

I hereby certify that the foregoing pages numbered 1 to 16, both inclusive, constitute a full, true and correct transcription of the proceedings had at the trial of the above-entitled matter reported by me on the 15th day of November, 1955.

Dated, Sacramento, California, November 29, 1955.

/s/ J. C. DUNN,
Official Court Reporter.

[Endorsed]: Filed November 29, 1955.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

The motion of the plaintiff to remand the above-entitled action to the Superior Court of the State of California, in and for the County of Sacramento, for trial and further proceedings came on regularly to be heard this 5th day of December, 1955. Both parties appeared by and through their respective counsel. Counsel for both parties argued said motion and the same was submitted to the Court for its decision and determination. The Court having considered said motion and the authorities submitted in connection therewith and being fully advised in the premises, now makes its order as follows:

It Is Hereby Ordered that plaintiff's motion to

remand this action to the Superior Court of the State of California, in and for the County of Sacramento, for further proceedings be, and the same is, hereby denied.

Dated: December 5, 1955.

/s/ SHERRILL HALBERT,

United States District Judge.

[Endorsed]: Filed December 5, 1955.

[Title of District Court and Cause.]

MINUTE ORDER

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday, the 19th day of December, in the year of our Lord one thousand nine hundred and fifty-five.

Present: The Honorable Sherrill Halbert,
U. S. District Judge.

This case came on regularly this day for Motion to file Amendment to Complaint and Motion to set. Charles J. Miller, Esq., present for the Plaintiff, and John V. Diepenbrock, Esq., present for the Defendant.

After hearing counsel, It Is Ordered that motion to file Amendment to Complaint be and the same is hereby Granted and Motion to set be and the same is hereby continued to January 16, 1956.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

This complaint filed in the above-entitled matter on May 27, 1955, is hereby amended by plaintiff to read as follows:

Page 3, Line 17, to read:

Seventy Thousand Dollars (\$70,000.00).

Page 4, Lines 14-15, to read:

Each of them for the sum of Seventy Thousand Dollars (\$70,000.00) general damages for the sum of Fifteen Hundred (\$1500.00).

Dated December 8, 1955.

BARNETT & ROBERTSON,
CHARLES J. MILLER,

/s/ RODNEY H. ROBERTSON,
Attorneys for Plaintiff.

Lodged December 12, 1955.

[Endorsed]: Filed December 19, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled action having heretofore regularly come on for trial before the above-entitled Court, Honorable Sherrill Halbert, Judge, presiding, a jury having been waived, the plaintiff appear-

mules and the consignee of said shipment, unloaded said horses and mules from said cars into said corral, watered them, fed them and took the exclusive custody and possession thereof; that from and after the arrival of said two (2) cars of horses and mules in West Sacramento, State of California, at or about the hour of 10:30 o'clock a.m. on the 16th day of December, 1954, to and including approximately the hour of 4:30 o'clock p.m. on the 18th day of December, 1954, (at which latter date the said H. L. Coon executed an order of diversion pursuant to which said shipment was reloaded and carried to Santa Rosa, California, the defendant, Southern Pacific Company had no possession and/or control of said horses or mules but, to the contrary, the sole and exclusive care, custody, control, ownership and maintenance of said horses and/or mules was with said consignee and owner, to wit, H. L. Coon.

VII.

That on the 17th day of December, 1954, at or about the hour of 6:15 o'clock p.m. of said day the plaintiff, Glen Earl Grigg, was operating his 1955 Cadillac automobile sedan in a general easterly direction on said Park overpass, U.S. Highway 40, and about one (1) mile west of Sacramento, California, and that while said horses and mules were in the exclusive care, custody, control, ownership and/or maintenance of H. L. Coon the latter, without any participating act or omission by defendant Southern Pacific Company, negligently and carelessly permitted or allowed said horses and mules

to stray or come upon said Park overpass on said U.S. Highway 40 and into the path of plaintiff's oncoming car, and at said time and place the car of plaintiff was caused to be struck by one or more horses or mules, damaging said car of plaintiff and causing plaintiff to sustain certain personal injury of undetermined nature and extent.

VIII.

That at the said time and place when plaintiff's said automobile struck one or more of said horses or mules, the plaintiff, Glen Earl Grigg, was operating his car with reasonable care and was not guilty of contributory negligence in the operation of his said automobile.

Conclusions of Law

As conclusions of law of the above and foregoing facts, the court finds as follows:

That the plaintiff take nothing by his said complaint against the defendant, Southern Pacific Company, a corporation, and that the same be dismissed and that said defendant recover its costs of suit therein incurred.

Let judgment on the merits be entered in accordance herewith.

Dated: March 30, 1956.

/s/ SHERRILL HALBERT,
Judge.

Lodged March 21 1956.

[Endorsed]: Filed March 30, 1956.

In the United States District Court for the Northern District of California, Northern Division

No. 7317

GLEN EARL GRIGG,

Plaintiff,

vs.

HARVER COON GENDEL; SOUTHERN PACIFIC COMPANY, a Corporation; FIRST DOE to SIXTH DOE, Inclusive,

Defendants.

JUDGMENT

The above-entitled action having heretofore regularly come on for trial before the above-entitled court, Honorable Sherrill Halbert, Judge, presiding, a jury having been waived, plaintiff appearing by his counsel, Charles J. Miller, Esq., and Messrs. Barnett & Robertson; and the defendant, Southern Pacific Company, a corporation, appearing by its counsel, Horace B. Wulff, Esq., and Messrs. Devlin, Diepenbrock & Wulff; and evidence both oral and documentary having been adduced, and after the plaintiff had completed the presentation of his evidence and rested his case, the defendant, Southern Pacific Company, reserving its right to offer evidence in the event that its motion be not granted, having moved the above-entitled court for dismissal on the ground that upon the facts and law the plaintiff had shown no right to relief as against the defendant, Southern Pacific Company, a corpora-

tion; and said motion having been duly argued and submitted and the Court as a trier of the facts having been elected to determine them and dispose of the case on its merits, and the Court having heretofore made and caused to be filed herein its written findings of fact and conclusions of law and being duly advised,

Now, Therefore, by reason of the law and the findings of fact and conclusions of law aforesaid, it is hereby ordered, adjudged and decreed that the plaintiff take nothing by this action and the same be and is hereby dismissed and the defendant, Southern Pacific Company, a corporation, do have and recover of and from plaintiff its costs of suit herein incurred in the sum of Dollars (\$.....).

Dated: March 30, 1956.

/s/ SHERRILL HALBERT,
Judge.

Lodged March 21, 1956.

[Endorsed]: Filed March 30, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL AND
FOR AMENDED FINDINGS

To: Southern Pacific Company, Defendant, and
Devlin, Diepenbrock & Wulff, its attorneys:

You Will Please Take Notice that on Monday, the 23rd day of April, 1956, at 9:30 o'clock a.m. of said day, plaintiff will, at the courtroom of the above-entitled court, located at the Federal Building, Sacramento, California, move the court for its order granting a new trial in the above matter and for its order amending the findings of fact in said matter.

Annexed hereto and made a part of this notice are:

- (1) Motion for New Trial and Amended Findings;
- (2) Memorandum of Points and Authorities in Support of Motion for New Trial;
- (3) Proposed Amended Findings of Fact.

Said motions will be based upon this notice, the above-listed documents, the testimony adduced at the trial and the exhibits admitted therein, and upon all the pleadings, papers, records and files in this action.

Dated: April 6, 1956.

BARNETT & ROBERTSON,
CHARLES J. MILLER,

By /s/ CHARLES J. MILLER,
Attorneys for Plaintiff.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND FOR
AMENDED FINDINGS

Pursuant to Rule 59, plaintiff moves the Court for its order setting aside the findings and decision in the above action, and granting a new trial therein on the following grounds materially affecting the substantial rights of said plaintiff, to wit:

1. That the evidence is insufficient to justify the decision;
2. That said decision is against the law;

Plaintiff also moves the honorable court, pursuant to Rule 59, for its order amending its findings of fact in the respects set forth in the Proposed Amended Findings of Fact annexed hereto.

This motion is based upon this document, the testimony adduced at the trial of the matter and exhibits admitted therein, and upon the pleadings, papers, records and files in this action.

Dated: April 4, 1956.

BARNETT & ROBERTSON,
CHARLES J. MILLER,

By /s/ CHARLES J. MILLER,
Attorneys for Plaintiff.

[Endorsed]: Filed April 9, 1956.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

In this case the Court has before it for decision and determination plaintiff's motion for a new trial and for amended findings, and plaintiff's motion to amend complaint to conform to evidence. Each of these motions has been argued by counsel representing each of the parties, and the respective parties have supported their positions by written memoranda. The Court has now reviewed the file in this case, the evidence adduced at the trial, and the law applicable to each of these motions, and good cause appearing therefor:

It Is Hereby Ordered that plaintiff's motion for a new trial and for amended findings be, and the same is, hereby denied;

And It Is Further Ordered that plaintiff's motion to amend complaint to conform to evidence be, and the same is, hereby denied.

Dated: July 16, 1956.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed July 16, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS

To the Clerk of the above-entitled Court:

Notice Is Hereby Given that Glen Earl Grigg, plaintiff in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered by the Court in said action after trial and on the merits, which judgment was in favor of the defendant, Southern Pacific Company, and against the plaintiff, Glen Earl Grigg, and which judgment was entered on or about the 30th day of March, 1956.

Dated: July 26, 1956.

BARNETT & ROBERTSON, and
CHARLES J. MILLER,

/s/ RODNEY H. ROBINSON,
Attorneys for Appellant.

[Endorsed]: Filed July 27, 1956.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF
POINTS ON APPEAL

To: The Honorable United States District Court,
Northern District, Northern Division, and to
the Honorable Chief Justice and Associate
Justices of the United States Court of Appeals
for the Ninth Circuit:

Appellant respectively states that the following are the points upon which he intends to rely on appeal:

1. The above-entitled court erred in denying plaintiff's motion to remand cause to the Superior Court of the State of California, in and for the County of Sacramento and that the above-entitled Court was, therefore, without jurisdiction to hear and determine said action;

2. The judgment of the above-entitled Court appealed herein is void since the Court was without jurisdiction to try said cause and that said Court should be ordered to remand this action to the Superior Court of the State of California, in and for the County of Sacramento;

3. The Judgment is against the law in that the effect of said judgment provides that an owner of land is not required to exercise reasonable care in the use of his land so as to protect third parties from being injured by said use;

4. The Judgment is against the law since the effect of said judgment is to provide that a common carrier, engaged in the transportation of livestock for hire, has no duty to exercise reasonable care to see that livestock held in said carrier's pens or corrals do not escape or otherwise injure third parties;

5. The Judgment is against the law since the effect of said judgment is to provide that a common

carrier, engaged in the transportation of livestock for hire, can delegate its duty to restrain said livestock in said carrier's pens or corrals, and by so delegating said duty, the said carrier is relieved of all liability to third parties for injuries suffered as a result of said live stock escaping from the carrier's corrals or pens;

6. The Judgment is against the law since the effect of the judgment is to provide that a common carrier, engaged in the transportation of livestock for hire, can hold said livestock in said carrier's pens or corrals for rest and feed and/or transshipment, and that said carrier can absolve itself from any and all liability for injuries caused to third parties by said livestock by simply authorizing the consignee of the livestock to feed, water and restrain the animals;

7. The Judgment is against the law since the effect of said judgment is to provide that a common carrier, engaged in the transportation of livestock for hire, can allow livestock, shipped by said carrier, to be placed in said carrier's corrals by the consignee and, even though said carrier has express knowledge that the consignee is not properly restraining said livestock, the carrier is not liable to members of the general public who are injured when said livestock escapes from the carrier's corrals or pens;

8. The Findings of Fact are not supported by the evidence.

Dated: July 26, 1956.

BARNETT & ROBERTSON, and
CHARLES J. MILLER,
/s/ RODNEY H. ROBERTSON,
Attorneys for Appellant.

[Endorsed]: Filed July 27, 1956.

In the District Court of the United States for the
Northern District of California, Northern Di-
vision

No. 7317

GLEN EARL GRIGG,
Plaintiff,
vs.
SOUTHERN PACIFIC COMPANY, a Corpora-
tion,
Defendant.

REPORTER'S TRANSCRIPT

Appearances:

For Plaintiff:

PHILLIP BARNETT, ESQ.,
RODNEY H. ROBERTSON, ESQ., and
CHARLES J. MILLER, ESQ.

For Defendants:

HORACE B. WULFF, ESQ., and
JOHN V. DIEPENBROCK, ESQ.

Tuesday, March 6, 1956

(Opening statement on behalf of Plaintiff by Mr. Robertson which is omitted from this transcript.)

GLEN EARL GRIGG

the Plaintiff, called in his own behalf, sworn.

Direct Examination

By Mr. Robertson:

Q. Mr. Grigg, where do you reside, please?

A. At the present time?

Q. Yes.

A. 2007 West 75th Street, Los Angeles, California.

Q. And where did you reside at the time of the accident?

A. At the time of the accident my address was P.O. Box 1187, Santa Maria; I believe that is correct.

Q. Now, on the day of the accident, Mr. Grigg, would you tell us where you were proceeding in your automobile?

A. I was on my way to Marysville.

Q. And where were you coming from?

A. San Fransisco.

Q. What time did you leave San Francisco?

A. Oh, I would say approximately four o'clock.

Q. And what highway were you using?

A. It is No. 40, I believe. I am not sure; is it No. 40?

(Testimony of Glen Earl Grigg.)

Q. At about 6:00 o'clock p.m. on Friday, December 17, 1954 [3*] were you operating your vehicle on the Yolo Causeway, I believe it is called, West of Sacramento? A. I was.

Q. And at that time what speed were you traveling, Mr. Grigg?

A. On the causeway I was traveling at 45.

Q. And what kind of an automobile were you operating? A. A 1955 Cadillac.

Q. And did it have any special equipment?

A. It had power steering, power brakes, completely, everything under power.

Q. As you came off the causeway you were proceeding in an easterly direction towards Sacramento; is that correct? A. Right.

Q. As you came off the causeway what lane of traffic were you driving in?

A. I was in the left lane.

Q. Is that the lane nearest the dividing strip between the two freeway lanes of traffic?

A. That is divided—at that point it is divided. The eastbound is that one on the upper part, and the westbound is down approximately 150 feet below it.

Q. And as you were proceeding in the left eastbound lane of traffic towards Sacramento and after having left the causeway at what speed were you traveling? A. Between 50 and 55. [4]

Q. And did you observe any traffic to your front at that time?

(Testimony of Glen Earl Grigg.)

A. Yes; there was a pick-up in the right lane and I had just gone by it or was just gradually pulling away from it when the accident happened.

Q. And what was the condition of the weather at that time as to whether it was light or dark?

A. Well, it was getting dark, 6:15, but the visibility was good.

Q. And were you able to see light from Sacramento at that time? A. Yes.

Q. Were you able to see a sign from the El Rancho at that time?

A. Well, that I couldn't say, because I don't think I even looked at it.

Q. And did you overtake on the left the Ford pick-up truck you mentioned which was on your right?

A. Yes; and was just drawing away from it.

Q. And as you were drawing away from it could you see it in your rear view mirror?

A. No; because it was over in the right lane and I hadn't gotten that far ahead of it.

Q. Now, approximately how far had you traveled from the causeway until you came across these mules? [5]

A. I would say approximately a mile.

Q. Now, as you were proceeding east toward Sacramento in the left lane was your attention directed to some animals on the highway?

A. As I came around the curve; yes.

Q. Tell us what you saw, please.

(Testimony of Glen Earl Grigg.)

A. As I picked them up in my lights making the curve I could see these animals coming up over the embankment onto the highway.

Q. Could you tell us how many you saw coming up over the embankment?

A. I don't know, there were two of them straight in front of me, I couldn't miss them.

Q. Did they come from your left to right?

A. They came from the left.

Q. Was there a deep gorge—is there a deep gorge along the left embankment of that freeway?

A. I beg your pardon?

Mr. Wulff: It isn't necessary to lead him.

Q. (By Mr. Robertson): Is there a deep gorge?

A. Yes; there is quite a depression there between the two lanes of traffic, between the east and westbound. It is, oh, maybe 20 feet, something like that.

The Court: Mr. Robertson, try to avoid leading questions.

Mr. Robertson: I didn't hear you, your [6] Honor.

The Court: Mr. Wulff raised the objection that you are asking leading questions and I asked you to avoid that.

Q. (By Mr. Robertson): When you saw these mules on the highway, what did you do, Mr. Grigg?

A. Well, I immediately tried to stop.

Q. And at the time you first saw them do you know about how far away they were from you?

A. I would say approximately 50 feet.

(Testimony of Glen Earl Grigg.)

Q. And when you saw them what did you do, when you saw them 50 feet away, as you said, what did you do? A. I tried to stop.

Q. Did you apply your brakes?

A. I certainly did.

Q. Now, at that moment when you first saw them 50 feet away did you look in your rear vision mirror?

A. No; I didn't have time, I was trying to stop.

Q. Now, Mr. Grigg, after you applied your brakes what happened?

A. I hit one mule with my left fender and the other one, as I came into him, he reared up and came right over the hood right into the windshield.

Q. And was the windshield shattered?

A. Broken all up, every bit of it.

Q. And did your car come to a stop?

A. Yes, sir. [7]

Q. And at the time of the impact, Mr. Grigg, did any part of your body strike any part of your car? A. Will you repeat that?

Q. At the time of the impact with the mule or the mules do you recall any part of your body striking your car?

A. Well, my whole body went forward at the impact, bent the steering wheel.

Q. Now, after your car came to a stop what did you do?

A. I got out of the car and by that time there were other cars coming up. In fact one car rolled

(Testimony of Glen Earl Grigg.)

into me, just barely touched me before I got out. I mean there was an impact from the rear.

Q. Did you observe another collision with the red truck?

A. I beg your pardon, I didn't hear you.

Q. Did you observe any other collision? You said after you got out a car rolled in near your back. Now, did you observe the red truck?

Mr. Wulff: That is incompetent, irrelevant and immaterial, your Honor. He is out of the car.

The Court: It may have something to do with the property damage.

Mr. Robertson: Yes.

A. Would you come over closer, please?

Q. You can't hear?

A. No; I can't hear too well. That is the [8] trouble.

Q. As your car was coming to a stop or after it stopped did you observe any collision of the red truck with mules or with your car?

A. That was off to my right and back of me. I couldn't see it.

Q. Did you feel any impact on the right side of your car? A. Yes; I did.

Q. After you got out of your car did you see any damage to the rear of your car?

A. Yes; the right rear bumber, the tip was knocked off, and the right quarter panel was demolished, and the deck, the rear deck was bent.

Q. And after you got out of your car was there a red Ford truck near?

(Testimony of Glen Earl Grigg.)

A. There was a Ford truck right back of me.

Q. And that was a truck that was owned by Stansel?

A. That is right.

Q. Now, Mr. Grigg, when you got out of the car did you see any mules or horses on the highway or near your car?

A. There was two of them; one of them just at the back of my car, the one I hit with the left fender, and the other was lying approximately at the front fender or close to it.

Q. After you got out of the car did you observe anything wrong with your body physically?

A. Yes; there was a lot of blood on my hand and my face was [9] bloody.

Q. Were you cut?

A. Yes. My index finger, I guess you call it the index finger, was cut from one end to the other.

Q. Indicating the right index finger?

A. Well, yes. And the knuckle on the second finger was cut loose and lying back.

Q. And you were bleeding from that?

A. Bleeding from that. And also bleeding from my face. There was a piece of glass one of the boys pulled out that was sticking right in my forehead.

Q. And what did you do as soon as you got out of your car and you noticed these things, Mr. Grigg?

A. Well, I was there for quite a few minutes until the—they cleared the trucks off and then the Highway Patrol, one of the men from the Highway Patrol, drove me up to the Receiving Hospital.

(Testimony of Glen Earl Grigg.)

Q. Did you talk to anyone at the scene of the accident right after it occurred, at all, Mr. Grigg?

A. The only one I remember—I was pretty badly shaken up—the only one I remember, I believe his name was Silverman—was it Silverman who had the Buick?

Q. And did you talk to the Highway Patrol officer? A. He handed me his card.

Q. And what was your general condition as you can describe it [10] at that time? Were you conscious or unconscious?

A. Yes; I was conscious, but I was badly shaken up.

Q. And you were shortly thereafter removed to the emergency hospital by the highway patrol?

A. Yes; as soon as the cars were taken off of the highway, then they took me up.

Mr. Robertson: I am showing counsel some pictures which we previously have shown to them.

Mr. Wulff: I have never seen these before.

Mr. Robertson: I have shown them to your associates.

Mr. Wulff: I beg your pardon.

Mr. Robertson: I understood we might be able to arrive at a stipulation without laying the foundation for them.

Mr. Wulff: We have no objection. The photographer would testify to these if he was present in court.

Mr. Robertson: Yes.

Your Honor, I have five pictures taken on Sept.

(Testimony of Glen Earl Grigg.)

27, 1955, at 11:45 a.m. of the eastbound freeway, which pictures are numbered, and I would like to introduce them at this time in evidence as Plaintiff's Exhibit 1 and then A, B, C, D and E. Would that be satisfactory?

The Court: I prefer to have them numbered separately.

Mr. Robertson: All right, 1, 2, 3, 4 and 5, your Honor?

The Court: All right. [11]

Mr. Robertson: And as I put them in, your Honor, I can read——

Mr. Wulff: How many are there?

Mr. Robertson: Five. And as I put them in, your Honor, I can read the photographer's report as to where each picture was taken from, the angle, and so forth.

All right, the first photograph, which is numbered 11346-1, is described by the photographer as "Camera on east end of bridge 22-103R, view facing east."

The second photograph, numbered 11346-2, which is being introduced as Plaintiff's 2 in evidence, "Camera on U.S. 40, fifty yards east of bridge No. 22-103R, view facing east."

The next picture, 11346-3, which is being offered as Plaintiff's 3 in evidence, "Camera on U.S. 40, 100 yards east of bridge No. 22-103R, view facing east."

The next picture, 11346-4, being offered as Plain-

(Testimony of Glen Earl Grigg.)

tiff's 4 in evidence, "Camera on U.S. 40, 150 yards east of bridge No. 22-103R, view facing east."

And the last photograph at this time, 11346-5, offered as Plaintiff's 5 in evidence, "Camera on U.S. 40, 250 yards east of bridge No. 22-103R, view facing west."

The Court: Give me the notation on that first one again, please.

Mr. Robertson: Yes, your Honor. "Camera on east end of bridge No. 22-103R, view facing [12] east."

Would you like me to repeat any of the others?

The Court: No. I just didn't get the location of the camera on the first one.

(The five photographs last described were thereupon marked Plaintiff's Exhibits Nos. 1 through 5, inclusive, and received in evidence.)

Mr. Robertson: If your Honor desires, I can introduce this letter for identification, if it will help.

The Court: I don't think it is necessary.

Mr. Robertson: All right. Now, I have an aerial photograph, your Honor—I will get the legend on it—"Verne W. Cartright, Photographer, copy of aerial mosaic of south of Sacramento freeway and vicinity; date flown, January, 1954; scale, 1 inch equals 340 feet."

I have previously shown this to Mr. Jack Diepenbrock.

Mr. Wulff: Is that date correct; January, 1954, counsel?

(Testimony of Glen Earl Grigg.)

Mr. Miller: That is correct, Mr. Wulff.

Mr. Wulff: I have no objection to it showing the conditions existing as of January, 1954.

Mr. Robertson: Pardon me?

Mr. Wulff: I have no objection to it as showing the conditions existing as of January, 1954.

Mr. Robertson: Yes. Now, insofar as Plaintiff's Exhibits 1 through 5, the photographs, Mr. Wulff, are you prepared to stipulate that those photographs demonstrate the [13] conditions as existing at the time of the accident? That is, the roadway?

Mr. Wulff: As far as Plaintiff's Exhibits 1, 2, 3, 4 and 5, you said they were taken in December, did you not, 1954?

Mr. Robertson: No; they were taken September 27, 1955.

Mr. Wulff: Aren't there some new buildings there? They show the general condition, yes; but so far as buildings are concerned and things by the road and things like that, there may have been some changes ten months later.

I don't know what the full purpose of your introduction is. If it is to show the general condition of the road, that I will stipulate to.

Mr. Robertson: The stipulation I asked for is would you stipulate that these pictures fairly depict the condition of the road and the conditions demonstrated in the photographs as to the road edges and the ditch down between the two freeways.

Mr. Wulff: As far as the construction of the freeway is concerned, I will so stipulate.

(Testimony of Glen Earl Grigg.)

Mr. Robertson: Very well. Thank you, Mr. Wulff.

Now, your Honor, at this time I wish to offer in evidence the aerial photograph that we have here which was prepared by Verne Cartright on a mission flown January, 1954, scale 1 inch equals 340 feet, as Plaintiff's 6 in evidence. [14]

Mr. Wulff: Your Honor please, I object to that except to the extent that it shows the conditions existing at the time the photograph was taken, which is about ten months prior to the accident.

The Court: Obviously that is what it has to show. I will admit all these photographs as heretofore indicated, as Plaintiff's Exhibits 1, 2, 3, 4, 5 and 6. Naturally the Court will accept them only as showing the conditions at the time they were taken.

Mr. Robertson: Yes. We are only going to use them for limited purposes, your Honor.

Now, in order to save time I am going to ask counsel if he is prepared to stipulate that the aerial photograph does demonstrate the general location of the freeway, highway 40, as relates to the Southern Pacific track right of way, and as relates to the position of the freeway in relation to the Southern Pacific corrals on the aerial photograph?

Mr. Wulff: None of those objects have been changed as far as locations are concerned?

Mr. Robertson: Yes. Stipulated that the location of the freeway is as appears on the aerial photograph, the location of the Southern Pacific

(Testimony of Glen Earl Grigg.)

right of way tracks, the location of the Southern Pacific stockyards.

Mr. Wulff: Counsel, there are other tracks shown in that besides the Southern Pacific tracks. The Southern [15] Pacific tracks show there but there is also the Port District tracks shown there, the Sacramento Northern tracks shown there. I think as far as the track layout is concerned, I know of no change.

Mr. Robertson: And also——

The Court: Gentlemen, does anybody have a map in this matter?

Mr. Wulff: No; I haven't

Mr. Robertson: Pardon me, your Honor.

The Court: Do you have a map in this matter?

Mr. Robertson: No, your Honor. And also the spur line running out from a generally northerly direction in a generally southerly direction.

Mr. Wulff: That is not a spur line, that is the Port District track. That is not owned by the Southern Pacific

Mr. Robertson: Well, whatever it is.

Mr. Wulff: That is not owned by the Southern Pacific. That is a track connecting the Southern Pacific and the Sacramento Northern tracks with the Port District's tracks, owned and operated by the Port District.

Mr. Robertson: But those things existed at the time of the accident.

Mr. Wulff: I think the tracks and the freeway

(Testimony of Glen Earl Grigg.)

depicted on this aerial conform to the conditions existing on the day of the accident. [16-17]

Mr. Robertson: And that is so stipulated?

Mr. Wulff: Yes.

Mr. Robertson: Thank you.

The Court: Gentlemen, why can't we have a map in this matter to show these things? I don't care how you get it drawn up, but I am no reader of aerial photographs, and things look from the air a lot different from what they look on the ground.

Mr. Robertson: May it please the Court, as far as the detailed map of the entire area, we are not using this photograph to show any exact route which the mules took to get from one place to another, we are merely trying to show the position of the S. P. corrals as relates to the highway, and also the general build-up of the houses and so forth in the area, your Honor.

The Court: Why can't it be done by the way of a very simple map?

Mr. Wulff: We don't know the route the cattle took, your Honor.

The Court: I am not talking about that. I am talking about the general lay of the land. You know where the railroad tracks are, you know where the highway is, you know where the streets and the roads are, and you know where the corral where these animals must have been, or at least where they were supposed to have been. [18]

Mr. Robertson: Mr. Miller tells me we can get a U.S. Survey map, your Honor, which would show

(Testimony of Glen Earl Grigg.)

these things that you just indicated, and we will try to get one at the noon hour, may it please the Court.

The Court: All right.

Mr. Robertson: So we will offer this then as Plaintiff's Exhibit 6 in evidence. I believe it has already been introduced; is that correct?

The Court: That is right.

(The aerial photograph previously described was marked Plaintiff's Exhibit No. 6 in evidence.)

Q. (By Mr. Robertson): Now, Mr. Grigg, I will show you Plaintiff's Exhibit I in evidence, a photograph taken from west towards the east of the eastbound freeway, and ask you if that photo depicts the general condition of the road on the day the accident occurred? A. It does.

Q. Now, Mr. Wulff, would you like to come up here? I am going to ask him to mark this.

A. As near as I can judge——

Q. Just a minute, Mr. Grigg. Now, will you please mark on the photograph where you saw the mules on the highway? I suggest you just make a circle where you first saw them.

Mr. Wulff: May I just ask one question, your Honor, in that regard? [19]

The Court: Yes.

Mr. Wulff: Before you mark this, please. Do you have in mind any physical objects on or near the road which refreshes your memory as to the location?

(Testimony of Glen Earl Grigg.)

A. No; it is the going around the curve when my lights come around this way and picked them up, approximately right in this corner here (indicating).

Q. (By Mr. Robertson): Will you please mark that on the road where you saw it with a circle?

A. (Witness marks on photograph.)

Q. You were present when these pictures were made; is that correct, Mr. Grigg?

A. Pardon?

Q. Were you present when these photos were taken? A. Yes; I was present.

Mr. Robertson: I will mark that "G-1," is that all right?

The Court: Yes.

Q. (By Mr. Robertson): Now, Mr. Grigg, this is the point where you say they first came up on the highway?

A. As near as I can judge from the picture, that is right.

Q. Now, will you make two circles on the photo, Plaintiff's 1, where the mules were on the highway, when you first started to apply your brakes, or where you hit them?

A. Approximately in the same position. When the lights hit them they just stopped right in front of me. The mules, after [20] they were on the highway, didn't move.

Q. Were they in the center of the——

A. One of them was in the center and one of them was a little bit to the left.

(Testimony of Glen Earl Grigg.)

Q. Will you mark that?

A. I would say approximately in the center (marking) as near as I can get to it, and the other one would be right closer to the edge here (marking on photograph).

Mr. Robertson: We will draw a line out and mark that "G-2" (marking on photograph).

Q. Now, the photo, Plaintiff's Exhibit 1, Mr. Grigg, demonstrates at the final part of it the road curving to the left? A. That is right.

Q. Now, does Plaintiff's 2 show the area where you actually struck the mules more clearly?

A. This is approximately the same spot, right here. This is about the same spot, right about here, right around the corner. I couldn't get it any closer.

Q. Now, Mr. Grigg, after your car came to a stop will you please tell us what the position of your car was in relation to the eastbound freeway?

A. As it come to a stop it was approximately a 45 degree angle pointing to the left.

Q. Would you be kind enough to mark on Plaintiff's Exhibit 1, the photograph, with a rectangle with a pointed end on one [21] end to show the front of the car, draw on the photo where your car was after it came to a stop?

A. It would be approximately at this angle, over, naturally, farther; it would be approximately 45 degrees (marking on photograph).

Q. Would you draw the point for the front and a square for the back, make a box out of it?

A. (Witness draws on photograph.)

(Testimony of Glen Earl Grigg.)

Mr. Robertson: We can mark that, counsel, "G-3" (marking on photograph).

Mr. Diepenbrock: All right.

Mr. Wulff: What number exhibit is that?

Mr. Robertson: Plaintiff's 1.

The Witness: Pardon me, may I have that for a moment? The back of this was extending over into this line.

Q. Well, will you draw a regular box, not just one line, but two lines and a point to the front?

A. I would say it was more or less this angle (marking on photograph). This sets approximately about a 45 degree angle.

Mr. Robertson: Counsel, I will just put a little point in front, is that all right? (Marking on photograph.)

Q. So, Mr. Grigg, is it true then that the rear part of your car was over the center white line?

A. Yes. [22]

Q. Would you describe, please, the physical condition of your car after you had stopped on hitting the mules?

A. You will have to get over here.

Q. You can't hear. Would you describe the physical damage to your car immediately after you got out, after it had struck the mules?

A. The hood was badly bent, the front fenders were bent, the windshield was out, the turret top was crushed in about——

Mr. Wulff: If the Court please, I think the car was repaired, the cost of repairs is the problem we

(Testimony of Glen Earl Grigg.)

have. There is no question it was damaged. Secondly, I think he sold it thereafter. I think those data would be what the Court is more interested in than these items.

Mr. Robertson: It is admissible, if it please the Court, to show the force of impact and the resulting damage to the man himself. That is why I want to show the amount of damage to the automobile, to show the force of the impact.

The Court: The objection is overruled.

Q. (By Mr. Robertson): Proceed with describing the damage to the car, Mr. Grigg.

A. The turret top was bent in about 12 or 14 inches, and the rear right quarter panel was badly damaged, and the rear bumper, the right hand tip was badly damaged, and the deck lid was bent and the back panel below the deck lid was bent. The steering wheel was bent. [23]

Q. You subsequently caused that car to be repaired, Mr. Grigg? A. I beg your pardon?

Q. You subsequently caused the car to be repaired? A. Yes.

Q. And where were those repairs made?

A. They were made at Roemer & Rubel in Santa Maria.

Q. And how much did you pay for the repairs, Mr. Grigg?

A. The bill there was some fifteen hundred and some odd dollars, but there was a grille added to that later that they don't have the bill for, it is

(Testimony of Glen Earl Grigg.)

somewhere. I had that done in Los Angeles at the Cadillac Motors. I can get the bill for that.

Q. How long did it take to repair the car?

A. Over three months.

Q. Do you recall how much you paid for the grille after the other repairs?

A. I don't. I can get that price for you. I can get that through any Cadillac agency, but I don't have it, and I don't remember the exact figures.

Q. Do you have any recollection of the approximate amount?

A. I wouldn't want to state—

Mr. Wulff: Objection, your Honor. He has testified he has no recollection of the price.

The Court: Well, I am not interested in any approximate amount. Those figures can be obtained with complete [24] accuracy, and there is no necessity for guessing.

Q. (By Mr. Robertson): Now, Mr. Grigg, when you were taken to the emergency hospital by the Highway Patrol officer was any treatment given to you there?

A. They cleaned the wounds and bound them up, but they wouldn't—they said I had to have a surgeon to do the work on my hand.

Q. And did you go to a surgeon?

A. I took a taxi and went to the Mercy Hospital.

Q. Was this on the same evening of the accident? A. Yes.

Q. Do you recall the name of the doctor who treated you there? A. Draper.

(Testimony of Glen Earl Grigg.)

Q. Draper?

A. Is that the name? Draper, I believe it is.

Q. Do you recall, please, what treatment was given you there at the emergency hospital?

A. Well, they X-rayed me, they called an X-ray man to come down to the Hospital, and the doctor came in and checked the X-rays and he sewed it up. At first he thought the tendon was cut, but it wasn't, and between the two fingers I had 17 stitches.

Q. And was any other treatment rendered to you?

A. He gave me medicine to stop the pain. [25]

Q. What about your forehead? That was cut, wasn't it?

A. Yes; but they stopped the blood on that at the receiving hospital.

Q. Where did you go from the Mercy Hospital, Mr. Grigg?

A. The boy that I raised came down from Marysville and took me up to his home.

Q. Did you get to his home in Marysville on the night of the accident?

A. Yes; about one o'clock.

Q. And what did you do then?

A. Went to bed.

Q. Went to bed. And how long did you remain in bed at Mr. Pekema's home?

A. Well, I got up the next morning, as far as that is concerned. I was there, I don't remember whether it was two or three days.

(Testimony of Glen Earl Grigg.)

Q. And following that, Mr. Grigg, did you return to Los Angeles, your home?

A. I went to San Francisco first and had Dr. Henning look me over, and then I went to Los Angeles.

Q. Would you describe, please, what complaints you had as to your body following the treatment at Mercy Hospital the night of the accident?

A. On my way to Los Angeles my back and hip got to bothering me pretty bad and I couldn't straighten up, so I stopped at [26] a chiropractor in Ventura and he gave me an adjustment, and I came back several days later and went to his office and he wasn't there, so I went to another man. So there were two treatments I had there.

Q. Did you have the stitches subsequently removed from your hand?

A. I beg your pardon?

Q. Did you have the stitches subsequently removed from your hand?

A. Yes. Dr. Randall in Santa Maria took those out.

Q. And did that hand ultimately heal up?

A. Eventually; yes.

Q. And how long did that take?

A. The soreness—the soreness was in there for several months.

Q. And have you any scars on that hand now?

A. Yes; scars on both fingers.

Q. Indicating your right index finger and your right second finger?

A. Yes.

(Testimony of Glen Earl Grigg.)

Q. Was there a scar on your forehead from this accident? A. Very slight.

Q. Now, Mr. Grigg, following the accident did the condition in your hip and back improve?

A. I am sorry.

Q. Following the accident did the condition in your hip and [27] back improve?

A. My back is all right, but the hip isn't.

Q. The hip did not?

A. No; it did not. It gradually got worse.

Q. Be sure and speak up so the reporter can get down what you are saying. And tell us, please, what kind of pain or symptoms, if any, you noticed in your hip?

A. Well, there is a catch in the muscle here.

Mr. Diepenbrock: Is this the present time?

A. And the nerve.

Mr. Diepenbrock: Excuse me just a moment. May we have the period of time of these complaints?

Q. (By Mr. Robertson): When you returned from Marysville to Los Angeles after the accident—about how soon after the accident did you go back down to Los Angeles?

A. I would say approximately a week.

Q. And the accident happened on the 17th. Were you down there on the Christmas holidays?

A. Yes.

Q. All right. Now, over the Christmas holidays in Los Angeles, tell us, please, what your general condition was, how did you feel?

(Testimony of Glen Earl Grigg.)

A. Well, I was sore and bruised, and I thought it was just bruised and I would get over it, but my hip started to bother me and it has gradually grown worse. [28]

Q. Did you subsequently go to see Dr. Henning in San Francisco after the Christmas holidays?

A. I did.

Q. And about when did you go there?

A. Well, I think the early part of January, if my memory is right.

Q. In 1955? A. Yes.

Q. And did Dr. Henning examine you there?

A. Yes; he examined me and also I had a series of X-rays taken.

Q. And at the time you saw Dr. Henning in January, 1955, what was the condition of your hip as far as you knew?

A. It wasn't paining me at the time very much. He gave me a general check-up, and he said "I want to check that hip." I told him it had bothered me for a while.

Q. Do you have any particular limitation of movement in your leg or hip?

A. Yes. I had catches in it when I sit on something low or get it in a position that wasn't straight.

Q. Now, Mr. Grigg, did you see Dr. Henning again after January, 1955?

The Court: I think we will take the morning recess at this time.

A. Yes. [29]

(Testimony of Glen Earl Grigg.)

The Court: We will take a brief recess at this time.

(Recess.)

Mr. Robertson: May it please the Court, Mr. Wulff has stated there is no objection if we draw a circle on the aerial photograph, Plaintiff's Exhibit 6, where the Southern Pacific corrals are and a circle on the freeway where the accident happened.

Mr. Wulff: The corrals aren't that big. I don't know who owns the land that you marked there.

Mr. Robertson: I made this circle as the general area of the corral and the general area of the accident.

Q. Mr. Griss, you stated you saw Dr. Henning in January of 1955, when he X-rayed the hip or had it X-rayed? A. Yes.

Q. Now when did you next see Dr. Henning?

A. Well, I think it was in February, March and April I went there.

Q. You saw him on successive occasions?

A. That is right.

Q. And on each of those occasions what were you complaining of to the doctor at that time?

A. Mostly soreness.

Q. Where? A. In my hip.

Q. And, Mr. Grigg, during this period of January through [30] April of 1955, did you attempt any activities or work?

(Testimony of Glen Earl Grigg.)

A. No, I haven't done any work. I have some cattle, but I didn't do any work with them.

Q. Did you try to do any work?

A. I tried to take care of the cattle for a couple of days and I couldn't do it.

Q. Tell us what you tried to do then and about when?

A. Well, in April I tried to go out and just check the cattle over, walk out on the permanent pasture a very short distance, but when I got back I was so sore I had to lie down.

Q. Where were you sore? A. In the hip.

Q. Mr. Grigg, did you attempt during this period, January to April, 1955, to start a new business?

A. I was on my way in December when this happened up to Marysville to talk to the boy about opening up a place.

Q. What type of place?

A. Automobile agency.

Q. How long were you in the automobile agency business prior to the accident, Mr. Grigg?

A. Approximately 36 years.

Q. And during that period of time——

Mr. Wulff: Your Honor please, I object to any evidence of loss of business, since it is not alleged, not an issue in this case. [31]

Mr. Robertson: It is not put in for the purpose of showing special damages as such, but is put in for the purpose of showing limitation, the man

(Testimony of Glen Earl Grigg.)

being ill, and not being able to move about or do anything, your Honor.

The Court: I will admit it for the sole purpose of showing the loss of earning power.

Q. (By Mr. Robertson): Now, Mr. Grigg, you say you were in the automobile agency business for 36 years?

A. Approximately, yes.

Q. During that period did you own agencies?

A. Yes.

Q. Take the period—you had an operation in February of 1954 on your stomach, isn't that correct?

A. Yes.

Q. And it was about that time that you closed your business in Santa Maria?

A. In March, after my wife passed away I started to close it.

Q. In the year prior to that, in the year 1953, did you operate the agency in Santa Maria?

A. Yes, I did.

Q. Describe the type of physical plant you had there, what your duties were, and what you did?

A. Well, I had a DeSoto-Plymouth and a very large used car business.

Mr. Wulff: If your Honor please, this is incompetent, [32] irrelevant and immaterial. He gave this business up in March, 1954, and the accident occurred in December, '54.

The Court: I am going to sustain the objection to what happened in 1953. It is obvious there has been a physical change in the man, a physical

(Testimony of Glen Earl Grigg.)

change in his home, so we are going to have to talk about what happened after that.

Mr. Robertson: May it please the Court, the evidence will show, it is in the depositions now, that the defendant claims the condition Mr. Grigg has now is a pre-existing condition and is not as a result of the accident, and I wish to produce evidence to show what his activities were before the accident to show that he had no difficulty.

The Court: Well, that is not before me at the present time. The record before me at the present time is he had an operation in 1954 and his wife passed away in the spring of 1954 and immediately thereafter he voluntarily started to close up the business he had at that time.

Mr. Robertson: The evidence also shows, your Honor, that on the day of the accident he was on his way to negotiate with Mr. Pekema the opening of another business.

The Court: That has nothing to do with what happened in 1953. That is what I want to do, is look forward and not backwards.

Mr. Robertson: I think we are entitled to show the man's condition of health before the accident, and what it is [33] now.

The Court: Well, suppose he had 1,500 automobile agencies in 1953 and he disposed of all of them and in the meantime he had two serious situations develop; one, he has a very serious operation, by your own opening statement and by his testimony, and the other is by the loss of his helpmate,

(Testimony of Glen Earl Grigg.)

and it changed his entire course of life. Now let's talk about what happened after that, not what happened before these things occurred. You, yourself, brought these matters into the record.

Mr. Robertson: Yes, your Honor, but I am not attempting to show loss of money, I am trying to show that he worked in and about his business for the year before the accident and he was in good health and now he can't work.

The Court: What you are attempting to show is that he worked in and about his business prior to the time he had a very serious operation and prior to the time that he lost his wife.

Mr. Robertson: All right, then, I want to show that after his operation he resumed normal activities.

The Court: All right, show that then.

Q. (By Mr. Robertson): Mr. Grigg, you had this operation on your stomach by Dr. Henning in February of 1954? A. January.

Q. January. When were you discharged from the hospital? [34]

A. I was there about 15 days.

Q. And what did you do after you were discharged? A. Went back to work.

Q. Where did you go back to work?

A. To my own business.

Q. Where? A. Santa Maria.

Q. What did you do there at that place of business?

(Testimony of Glen Earl Grigg.)

A. I directed the whole operation and did 50 per cent of the selling.

Q. How many hours a day would you work?

A. Anywhere from 10 to 14.

Q. Did the fact that you had this stomach surgery in any way affect your ability to work in your business after the operation? A. No.

Q. Did you play golf after the operation?

A. Yes.

Q. And how often would you play golf?

A. Oh, I would play golf, sometimes I would go for a month without playing, and then maybe I would play three times a week.

Q. And how many holes would you play when you played golf? A. As a rule 18.

Q. And did you do any hunting following the operation? [35]

A. Yes, I did. I was pheasant hunting in Marysville in November before the accident in December.

Q. And how many days did you hunt?

A. Three.

Q. And can you tell us, please, how far, and how long you walked during this period of hunting?

A. Well, you cover quite a bit of ground, after the first day, and they get to be scarce you cover quite a bit of ground. I would say in the last day we hunted there was about 300 acres and we traveled all over it.

Q. Did you have any difficulty moving about while hunting in the fields? A. No.

(Testimony of Glen Earl Grigg.)

Q. Did your hip or leg or back give you any trouble? A. No.

Q. Did your stomach give you any trouble?

A. No, sir.

Q. Have you had any trouble with your stomach since the accident? A. No, I have not.

Q. Now, Mr. Grigg, you say you saw Dr. Henning in January, February, March and April. When did you again see him?

A. It was either in September or October; I haven't the exact figures.

Q. In 1955? [36] A. Yes, sir.

Q. And during the period of approximately May and June of 1955 to September you were in Europe? A. That is right.

Q. Will you state the purpose of your going abroad, Mr. Grigg?

A. Well, for two reasons, I had two reasons. One of them was pleasure, and the other one I was investigating the foreign car market.

Q. For what purpose?

A. With the idea of handling them over here.

Q. Now, what was your general condition of your hip while you were in Europe, Mr. Grigg?

A. It was—I would say it was the last of June or on the first of July it got bad, I was in Germany, I had to get a cane, and I have been using it ever since.

Q. You didn't use a cane before that?

A. No.

(Testimony of Glen Earl Grigg.)

Q. Then you returned from Germany, is that correct, from Europe to the United States?

A. Yes, sir.

Q. And you again went to see Dr. Henning?

A. I did.

Q. This was in October or November, 1955?

A. Yes. [37]

Q. And what did you complain of at that time to Dr. Henning?

A. I told him what had happened to my hip, that it was getting worse all the time, and he had some more X-rays made and had them checked and he gave me some medicine to take to ease the pain.

Q. Did he prescribe any treatment or give you any treatment?

A. No, he didn't prescribe treatment, because it was in the ball joint, and there is no way of treating it without surgery.

Q. Did he prescribe limitation of activities?

A. Yes, he told me not to do too much walking, and be sure to use the cane to keep my weight off of it.

Q. What have been your activities as to golf—

The Court: Let me get this straight. When is this now that the doctor prescribed this?

A. This was after I came back from Europe, I got back some time after the middle of September.

The Court: All right, proceed.

Q. (By Mr. Robertson): What have been your activities since the accident in relation to golf,

(Testimony of Glen Earl Grigg.)

hunting or working, Mr. Grigg? A. None.

Q. And Mr. Grigg, after October or November, 1955, have you gone to any other doctor in regards to your left hip?

A. Yes, Dr. Sanderson, I went to him several times. [38]

Q. And how many times did you visit him?

A. I think I have been to him four times.

Q. And what has he done, if anything, for your hip?

A. He has had a number of X-rays taken of it and watched the progress of it.

Q. Has he indicated any treatment?

A. No, nothing outside of surgery.

Q. Now what is your present physical complaint insofar as your hip is concerned, Mr. Grigg?

A. The joint is sore, the nerve in front of my leg hurts and the pain goes all the way down my leg, and at times I can't get up and down.

Q. Do you have difficulty operating a car?

A. No, because I don't use that foot in operating a car.

Q. Do you have difficulty in walking?

A. Yes.

Q. Do you limp?

A. I can't walk without a cane.

Q. This pain you describe, is it constant or does it come and go? A. Spasmodic.

Q. Are you taking any medication for that?

A. I take some medicine Dr. Henning gave me for pain, relief of pain.

(Testimony of Glen Earl Grigg.)

Q. And have you any other complaints as a result of [39] accident other than the hip at the present time? A. Outside of the hip?

Q. Yes. A. No, none at all.

Q. And now, Mr. Grigg, when this mule struck—you say it came through your windshield?

A. One of them's head came all the way through the windshield and hit me in the face, and I had grass stains from my shoulder right straight down to my hip.

Q. You say it hit you in the face and you had grass stains? A. Yes.

Q. Mr. Grigg, did you have any difficulty with your teeth after this accident?

A. Yes, my teeth got loose and I had to have them taken out.

Q. How many of your teeth?

A. My upper front teeth, I think there were six or seven of them. I had a partial plate.

Q. In the front of your mouth? A. Yes.

Q. Before the accident were those teeth loose or did you have trouble with them?

A. No. I had them for several years and they didn't bother me at all.

Q. And who took the teeth out and about when was it done?

A. Dr. Ken Mar in Stockton. [40]

Q. Do you know how much that cost, Mr. Grigg?

A. Well, he made the upper set, and after I got back from Europe I had to have them done over. I think it was 150 the first time and 75 the second.

(Testimony of Glen Earl Grigg.)

Q. Mr. Grigg, how do you feel now and what are your present complaints?

A. My complaint is lack of locomotion in my hip.

Q. Are you suffering any pain there now in your hip?

A. There is constant pain in my hip when I am using it.

Q. Do you have any difficulty sleeping?

A. Yes, I do. I can't lie on my left side.

Mr. Robertson: Now, your Honor, I have shown counsel a series of bills for doctors, X-rays, dentists and the like, and I would like to see if we can't stipulate rather than having the witness testify to each one.

Mr. Wulff: The only objection I have is to Dr. Sanderson's X-ray bill there because I understand he merely examined him for testimony purposes.

Mr. Robertson: Is this one here all right (indicating)?

Mr. Wulff: I have no objection.

Q. (By Mr. Robertson): All right. Now, Mr. Grigg, I will show you a bill of Roemer & Rubel, Santa Maria, for car repairs in the total amount, a three page document, of \$742.16 for parts and \$813.06 for labor, total bill \$1,555.22. Is that the bill that you received from that agency? [41]

A. That is right. The grille is not included in this.

Q. Did they repair your car? A. Yes.

Q. And you paid them?

(Testimony of Glen Earl Grigg.)

A. Yes, that is the payment.

Q. And the grille is not included?

A. No, the grill is not included.

Mr. Robertson: I will offer that as Plaintiff's Exhibit next in order, your Honor, counsel having inspected it.

The Court: Plaintiff's Exhibit 7.

(The document referred to was marked Plaintiff's Exhibit No. 7 in evidence.)

Mr. Robertson: Now, may it please the Court, I have a series of bills put in chronological order as to the dates of various hospital, X-ray technicians——

A. Pardon me, but Dr. Sanderson's bill is not in there. It hasn't been paid.

Mr. Robertson: And I am wondering if we can put them in as one exhibit. Counsel has examined them, your Honor. I have taken out Dr. Sanderson's X-ray, and he appears to have no objection to them, and the total is \$420.62.

Q. I will ask you, Mr. Grigg——

Mr. Wulff: What is the total amount?

Mr. Robertson: My totals shows it to be \$420.62.

Q. I will ask you, Mr. Grigg, to quickly look at this [42] batch of bills and ask you if you received those and they were paid?

A. Yes, they are all paid.

Mr. Robertson: May I submit these as one exhibit, your Honor?

The Court: Plaintiff's Exhibit 8.

(Testimony of Glen Earl Grigg.)

(The documents referred to were marked Plaintiff's Exhibit No. 8 in evidence.)

Q. (By Mr. Robertson): Now, in that group of bills of Dr. Henning, and the dentist, Dr. Mar, the Mercy Hospital, Dr. Draper, Dr. Randall, J. C. Sewell, the Osteopath, G. J. Myers, the Osteopath, Dr. Case, the dentist, and Dr. O'Neill, the X-ray man, and then certain medicines, is that correct?

A. That is right.

Q. Now you have not yet received a bill from Dr. Sanderson? A. No, I haven't.

Q. Now, Mr. Grigg, how long had you owned the 1955 Cadillac coupe that was in this accident prior to the accident?

A. I bought it on the 8th day of December and wrecked it on the 17th.

Q. Mr. Grigg, do you recall what you paid for the automobile?

Mr. Wulff: If your Honor please, that is immaterial. The cost of repairs are involved here.

Mr. Robertson: I am going to show depreciation by virtue of the wreck, your Honor. It was a brand new car, [43] he had it for a few weeks, it was wrecked, and repaired and sold at a depreciated loss.

The Court: We know with any car the very minute you take it off the lot, you take it back they won't pay you the price you paid for it.

Mr. Robertson: That is true, your Honor, but a car that has been wrecked, a 1955 Cadillac in De-

(Testimony of Glen Earl Grigg.)

cember of '54, it is a '55 Cadillac, it becomes a question of materiality. The testimony would be by offer of proof that he paid "X" dollars for it and he was caused to sell it for "X" dollars less, and had it not been in a wreck he could have gotten the regular price for it. Mr. Grigg has been in the automobile business for over 30 years, and it is a question of materiality.

The Court: What is the materiality of the repair bill?

Mr. Robertson: Well, he had to repair it in order to sell it.

The Court: No, he didn't have to repair it in order to sell it. The law in my opinion is very clear, that when something can be repaired you are required to take the repair bill or the depreciation in the value.

Mr. Robertson: Well, yes, your Honor, but the depreciation in value if you did repair it would be the cost of the repair plus the depreciated value of a car that has been in a wreck. I think your Honor can take judicial notice that a buyer [44] will pay less for a car that has been in a wreck.

The Court: I am not going to allow you to put the evidence in at the present time. You are going to have to show me some law that you are entitled to it.

Mr. Robertson: Does your Honor want to reserve the ruling?

The Court: No, I am not going to reserve the

(Testimony of Glen Earl Grigg.)

ruling. I say I am not going to allow it unless you show me some law that you are entitled to it.

Mr. Robertson: I will show you a bill of the Cadillac Motor Division of Los Angeles under date of December 9, 1954, for a Coupe de Ville automobile. Looking at that would you tell us, please, what you paid for the car?

A. I paid \$5,360.08.

Mr. Wulff: I object to that because that includes sales tax and includes license.

A. That includes sales tax and license.

The Court: I am going to sustain the objection to that. Even on your theory, what he paid for it doesn't make any difference. The question is how much was the car worth at that time.

Q. (By Mr. Robertson): Mr. Grigg, how much was the 1955 Coupe de Ville Cadillac worth that you bought at that time?

A. That is the list price on the automobile.

The Court: No, Mr. Grigg, the only question is what was that automobile worth, what was the reasonable market value [45] of that automobile at that time. If you know you may answer. If you don't know——

A. You mean for resale?

The Court: No, the reasonable market value.

A. You want the sales tax and license fee taken out?

Q. (By Mr. Robertson): No, the Judge asked you, Mr. Grigg, how much was this new 1955 Cadillac worth in December 9, 1954, the reasonable

(Testimony of Glen Earl Grigg.)

market value, what you would have to pay for the car at that time new?

A. Just exactly what I paid for it is the list price of the automobile.

Q. That is \$5,360.08?

Mr. Wulff: Same objection, your Honor.

A. \$5,360.08.

The Court: Wait a minute. The objection is sustained and the answer is stricken. That question can be answered and that is all there is to it.

Q. (By Mr. Robertson): Mr. Grigg, on December 9, 1954, the day you bought this new Cadillac Coupe de Ville brand new, what would you have to pay for that car to buy it?

The Court: No, that is not the question. The question is what was the reasonable market value of that car on that day?

A. May I answer that this way, your Honor? At that time this particular model was so scarce you could have gotten the price [46] for it.

The Court: Mr. Grigg, it is a very simple question. What was the reasonable market value of that automobile in December when you bought it?

A. The reasonable market value I think would be what you would have to pay for it.

The Court: Mr. Grigg, can't you answer that question?

A. I misunderstand you some way. You are talking about—do I want to take the sales tax and license off or do you add those in?

(Testimony of Glen Earl Grigg.)

The Court: I want the reasonable market value of that automobile on that day.

A. \$5,360.08 is the reasonable price for it, what it sold for.

Q. (By Mr. Robertson): Mr. Grigg, after the car was repaired it was sold?

A. That is right.

Q. And how much did you sell the car for?

A. \$4,850.00.

Mr. Robertson: That is all we have from the Plaintiff at this time, your Honor.

The Court: When did you sell that car?

A. I sold it in about three weeks, I think it was, after it was repaired.

The Court: I think you said it took about three months to repair it? [47]

A. That is right, a little over three months.

Q. It would be about four months after the accident?

A. Roughly four months.

Q. What was the reasonable market value of that automobile four months after the accident, which would be about April 9, 1955?

A. Well, if that car had not been wrecked I could have gotten——

Q. Well now——

A. We will say that I sold it at a reasonable price, then. That is as far as I can tell you.

Q. In other words, you think you got the reasonable market value of the car at that particular time?

(Testimony of Glen Earl Grigg.)

A. In the existing condition of the car, yes.

Q. What would be the reasonable market value of any Cadillac that was six months old?

A. I would say five thousand.

The Court: In other words, all this talk about \$150.00, is that it?

Mr. Robertson: That is all, your Honor.

Mr. Wulff: If your Honor please, with the Court's permission may Mr. Jack Diepenbrock cross-examine the witness. He took his deposition.

The Court: You are associated——

Mr. Wulff: That is correct. [48]

The Court: You don't have to have my permission as to how you want to operate.

Mr. Diepenbrock: Your Honor, I think it might speed up things if we took the lunch hour now. I was in another case that just finished last night at 8:00 o'clock, the jury just came in at 8:00 o'clock.

The Court: What is this, one of those double plays here from Evers to Tinker to Chance?

Mr. Diepenbrock: I will go ahead if your Honor wishes, but I think we can go faster——

The Court: I will take my chances on your spending 15 minutes now, because I can't start until 1:45 today. You certainly have got some questions you can ask.

Mr. Diepenbrock: All right.

The Court: Time is too precious in this Court to lose even 15 minutes.

Mr. Diepenbrock: Certainly.

(Testimony of Glen Earl Grigg.)

Cross-Examination

By Mr. Diepenbrock:

Q. Mr. Grigg, when you first saw these mules they were stationary on the highway, I think your testimony was? A. I beg your pardon?

Q. Referring to Plaintiff's Exhibit No. 1 when you first saw the mules they were out there on the shoulder and on the highway, is that correct? [49]

A. One was practically in the center and this one on the left side, I struck that with my left fender. In the position of this curve I can't place those mules as good as they were down here at a different angle.

Q. And those mules stayed right there where you have marked them here from the time that you saw them until the time that you hit them?

A. As far as I could say to that, with all the excitement of trying to stop, I couldn't say whether they moved a little bit or not.

Q. I see. But if they did it wasn't very much. As you were driving along there you said that you passed a pick-up truck, I think?

A. I said I went by him. He was in one lane and I was in the other. That is not passing.

Q. I see. In any event you started out behind him and you were going past him, as you say. How far past him had you gotten?

A. Not far enough for me to see him in my rear

(Testimony of Glen Earl Grigg.)

view mirror. I couldn't say, because I wasn't looking back, but I would say a very short distance.

Q. And of course I think we all know that when we are on an ordinary two lane highway and you pass a car we get back over to our own lane before we can see the car we pass in the rear view mirror. That is correct, isn't it?

A. That is right. [50]

Q. And there was another car, I think you said, behind you, a Buick?

A. Came up after the accident and rolled right into the edge of my car. Just broke his head lamp and that is all.

Q. Were you aware of him being behind you at the time that you saw the mules?

A. I knew there were some cars behind me, but there was quite a little space between us.

Q. Now you mentioned, I think, in your direct examination that—by the way there is a circle on here. Did you draw this circle on here or did Mr. Robertson put that on?

Mr. Robertson: No, I did.

A. Mr. Robertson put that on.

Q. (By Mr. Diepenbrock): What is that supposed to be? Does that call something to your mind?

A. Yes. This is an aerial photograph. I am going this way.

Q. Now wait a minute. Here is Sacramento here. Here is the tower bridge. You mean that this highway should be over here (indicating)?

(Testimony of Glen Earl Grigg.)

A. No. It don't show the curve there as straight as it should, but an aerial photograph always reverses it. You notice there is a line there, when you come into town you come in on—this would be my left lane, wouldn't it? Is that correct?

Q. Isn't this the highway you were on? I don't quite understand [51] what they have done here.

A. This is the divided highway here (indicating).

Mr. Robertson: At the end of the recess I told counsel and he said he had no objection I would draw a circle around the general area where the corrals were and draw a circle around the general area of the highway where the accident happened.

Mr. Diepenbrock: Well, the point is Mr. Grigg seems to think that he was over on this other highway.

A. No, no, I am trying to get this thing straight as you come into town. This would be your left lane here, wouldn't it?

Mr. Diepenbrock: I think you better find out if he understands the picture.

Mr. Robertson: This is going east towards town (indicating).

A. Right.

Mr. Robertson: This is the El Rancho.

A. But there is two—this is the lower—this is the westbound, right (indicating)?

Mr. Robertson: Yes.

A. And this is the eastbound (indicating)?

(Testimony of Glen Earl Grigg.)

Mr. Diepenbrock: And you were on the east-bound?

A. Yes.

Q. And that eastbound is the two lanes of travel that has the circle drawn around it?

A. That is right. [52]

Q. Now this curve that you spoke about, will you point that out on this picture here?

A. I would much rather if you would let me have the other photograph for one moment, I think I can show you the difference on the aerial photograph and the one that isn't.

A. Here is the Plaintiff's Exhibit No. 1.

Q. Here is Plaintiff's Exhibit No. 1.

A. All right. That is enough. This is the way we are going into town right here (indicating).

The Court: What are you accomplishing with all this?

A. You see the difference here in the angle on an aerial map?

Mr. Diepenbrock: I am not just wasting time, your Honor.

The Court: I know, but the point I am getting at is this is the very thing that I was critical of to begin with. If we had a map here we wouldn't have to be worrying about whether an aerial photograph shows a thing incorrectly. I think Mr. Grigg is entirely right, the average layman can't look at an aerial photograph and tell things, because of necessity it has to be taken at an angle.

A. That is right.

(Testimony of Glen Earl Grigg.)

The Court: You can't fly over an entire area with just one single move.

Mr. Diepenbrock: I think Mr. Grigg has said he can express himself with this ordinary photograph. [53]

A. That is right. This is the angle, I would figure that that is about a 45 degree angle, and this was over it, might come over a little farther in here, a Cadillac is a rather long automobile (indicating). That is not the true position of the car; you couldn't put in that way.

Q. (By Mr. Diepenbrock): That is correct. Can you tell me what the distance is that is embraced in this photograph, Plaintiff's Exhibit No. 1, from where you have the horses marked "G-1" and "G-2" and the forepart of the picture, how many feet of highway is that?

A. I believe that is on record over there, you have it. It is on record over there. The distance of each one of those pictures is on your record there.

Q. Which record is that? Is that on this legend?

Mr. Robertson: Yes.

Mr. Diepenbrock: May I refer to it?

Mr. Robertson: Certainly.

Mr. Diepenbrock: Well, this just tells where the camera was, Mr. Grigg, that doesn't answer my question. Well, it tells me where the camera is, it is on the east end of the bridge out there, but I don't know what the distance is from that bridge to where you hit the mules.

(Testimony of Glen Earl Grigg.)

Mr. Robertson: If you don't know, Mr. Grigg, say so.

A. I don't, I couldn't tell you by looking at this photograph just how far they were taken back here. [54]

Mr. Robertson: You see, counsel, those pictures only demonstrate the roadway and the ditch there.

Mr. Diepenbrock: Yes. Very well.

Mr. Roberston: They don't particularly demonstrate as they would if they were taken from the front side of the automobile or anything of that nature.

Q. (By Mr. Diepenbrock): There isn't much of a curve out there anyway, is there, Mr. Grigg?

A. I beg your pardon?

Q. I say there isn't much of a curve in that highway before you come up to the point of impact, is there?

A. There is quite a little curve in there and the lower part between the two highways, you can't see over that, where the mules came from, you can't see that.

Q. You can't see down in the depression?

A. Not at night, no.

Q. You can see a part of the embankment, can you not?

A. I beg your pardon?

Q. Can you see a part of the embankment?

A. I am sorry.

(Question read by reporter.)

A. Yes, coming up over the embankment.

(Testimony of Glen Earl Grigg.)

Q. (By Mr. Diepenbrock): Now that picture there, Plaintiff's Exhibit No. 1, that shows how everything was after the accident, is that correct, or before the accident, or at the moment of [55] the accident?

A. Well, at the moment of the accident, that is approximately the position I was in when I stopped.

Q. I see. And your car was tilted off at about a 45 degree angle, I think you said?

A. That is right.

Q. And how did it get in that angle, Mr. Grigg?

A. Well, when the second mule came in through the windshield I had no way of controlling it.

Q. I see. Now, Mr. Grigg, I don't think you told us your age.

Mr. Robertson: He can't hear you.

Q. (By Mr. Diepenbrock): Your age, Mr. Grigg. A. My age?

Q. Yes. A. 64 years old.

Q. 64. And you are presently suffering from certain illnesses at the moment, are you not?

A. I am what?

Q. You are sick now, are you not, Mr. Grigg? Aren't you having some trouble with your bladder?

A. No, I am not having any trouble with my bladder.

Q. Your bladder condition has been taken care of?

A. I had a small growth on the neck of my bladder which was taken off when I had my stomach taken out. [56]

(Testimony of Glen Earl Grigg.)

Q. I see. There has been no further treatment done there?

A. I have been back for one examination since.

Q. Your stomach condition was of long standing, was it not, the ulcers?

A. Yes, I had them several years.

Q. When did they start to bother you?

A. Oh, I would say about '46 or '7.

Q. And that progressed until it was necessary to have this operation in January of '54?

A. Yes, from my own idea; I just got tired of being worried with them, and I called my doctor and told him to get ready, I was coming up to have him take them out.

Q. You say you have no trouble with your back at the present time?

A. No, not bad, about the only time it bothers me, if I walk too much it gets tired, in the position I have to walk with a cane.

Q. The chiropractic treatment that you got in Ventura, was that directed to your hip or your back, or where?

A. My back had stiffened up. It didn't bother my hip at all, my back stiffened up from the jolt that I took.

Q. You had had trouble with your back prior to the accident in '54?

A. Not in a number of years.

Q. Pardon me? [57]

A. Not in a number of years.

Q. Not in a number of years. You had had

(Testimony of Glen Earl Grigg.)

trouble with your hip prior to the accident, had you not?

A. I had had a little slight touch of arthritis in it, but it had cleared up.

Q. It had cleared up?

A. It had cleared up, it didn't bother me.

Q. And when was the first time that you noticed trouble with your hip?

A. I don't know, '51 or '2.

Q. And you saw Dr. Henning about that condition, did you not? A. I did.

Q. And Dr. Henning had some X-ray pictures taken of your hip, did he not?

A. He had pictures taken the first time he examined me.

Q. And he told you that you had arthritis in your hip, did he not?

A. He told me I had a slight case of arthritis, yes.

Q. And he told you to curtail your activities somewhat, did he not? A. No.

Q. He did not?

A. Not at that time. It wasn't bad enough.

Q. Did he tell you to curtail your activities at any time prior to the accident? [58]

A. Yes, he told me to take it easy for a while after my operation and losing my wife.

Q. He, at no time prior to the operation told you to limit your activities, your stomach operation?

A. Well, that I can't answer, not that I re-

(Testimony of Glen Earl Grigg.)

member. He told me that anybody my age should take it easy. He told me that.

Q. This horseback riding that you have done—what do you call that trip?

A. Oh, I raised horses and have ridden horses, I have been on trail rides.

Q. Yes, that trail ride, that is an annual affair, isn't it? A. Yes.

Q. When was the last time prior to the accident that you took that?

A. I haven't taken a trail ride since I left Marysville, and I think I left there in '50.

Q. '50 is the last time you took it?

A. Yes.

Q. Isn't it a fact that Dr. Henning told you not to take that trip on one year because of your arthritis? A. I don't remember, I don't think so.

Q. You don't remember?

A. I don't think so.

Q. Now, with reference to your—well, let me ask you this: When is the last time that you played 18 holes of golf prior [59] to the accident?

A. In October.

Q. In October. When was the last time prior to that?

A. I played several times during October and I played in September.

Q. Let me ask you this, about your teeth, I am a little uncertain; you say the teeth that were taken out you had had for several years?

A. I had two partials that I had had for several

(Testimony of Glen Earl Grigg.)

years, and then after this, the upper teeth that held the partial in were loose and I had to have them pulled out, and I didn't have enough remaining teeth to bridge it over.

Q. I see. So that there were two of your natural teeth that were removed, and the rest were false?

A. Pardon me?

Q. There were two of your natural teeth which were removed?

A. Two of them which were removed—yes, there were three that were loose, one of them I had had pulled out and one put in in this partial right after the accident, and the others, they loosened up gradually until I had them all pulled out.

The Court: We will take the noon recess at this time. Take the recess until the hour of 1:45, a quarter to two, at which time we will resume the trial of the case.

(Recess taken to 1:45 p.m. this date.) [60]

Tuesday, March 6, 1956—1:45 P.M.

GLEN EARL GRIGG

resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Diepenbrock:

Q. Mr. Grigg, where had you been in San Francisco just prior to leaving?

A. I beg pardon?

(Testimony of Glen Earl Grigg.)

Q. What part of San Francisco did you leave from?

A. I think about the last place I was was 450 Sutter.

Q. 450 Sutter. You had been to the doctor that day?

A. I had been there to see him. I have lunch with him once in a while.

Q. I see. Had you been there as a social matter, or to get medical attention?

A. No, just social.

Q. Just social. Do you wear glasses, Mr. Grigg?

A. Pardon me?

Q. Do you wear blasses, eye glasses?

A. To read by is all.

Q. To read by. You don't wear them to drive?

A. No.

Q. And they are not required in your driver's license? A. No, sir.

Q. I see. And you told us that you were in Europe after [61] the accident. How long were you over there?

A. I guess about—I don't remember the date I sailed—or I flew over, but it was in May or June, and I came back—I left there the 26th of August.

Q. Did you travel around Europe extensively?

A. Yes, quite a bit.

Q. How did you get around?

A. I drove.

Q. You drove an automobile? A. Yes.

Q. And did you do a lot of walking over there?

(Testimony of Glen Earl Grigg.)

A. No, very little.

Q. Did you have any accidents over there?

A. No, sir.

Q. Were you able to drive your automobile comfortably?

A. That particular car I drove because I could keep my legs straight, I sat right down on the bottom and I kept my legs stretched out.

Q. What kind of an automobile was that?

A. Jaguar.

Q. That was yours? A. Pardon me?

Q. You bought that? A. I did.

Q. Now going back into your past history, you had trouble with [62] your neck in 1945, didn't you? Do you remember that?

A. I had what?

Q. Neck trouble in 1945.

A. I don't remember.

Q. Didn't you have your neck X-rayed for arthritis at that time?

A. That I couldn't tell you. I don't remember those dates.

Q. And you had arthritic trouble in your shoulder in 1947, did you not?

A. Yes, I had a little bit of trouble with the shoulder, not to amount to anything.

Q. You went to Dr. Henning about your shoulder in '47, didn't you?

A. Well, I go to see Dr. Henning regularly for a check-up.

(Testimony of Glen Earl Grigg.)

Q. And you were also going pretty regularly to the clinic down in Santa Maria, were you not about various aches and pains?

A. I am sorry, I didn't hear you.

Q. I say weren't you also going to the clinic in Santa Maria to Dr. Randall down there, about your arthritis prior to this accident?

A. No, not for arthritis.

Q. What were you seeing him for down there?

A. Not that I can remember of. I went there with my stomach before my operation.

Q. You didn't go there for anything other than your stomach? [63]

A. Not that I can recall.

Q. After the accident you returned to Santa Maria?

A. I was in and out of there, yes.

Q. And you took your car down there to be fixed?

A. I didn't take it down, I had it taken down.

Q. I see. How did you get there?

A. I drove another car down.

Q. You bought another car? A. Yes.

Q. What kind was that?

A. I bought a Cadillac.

Q. And were you able to drive it all right?

A. Yes. You don't use your left leg in driving that type of car.

Q. One thing, Mr. Grigg, I think that on this list of doctor bills there is an osteopath, is that correct?

(Testimony of Glen Earl Grigg.)

A. I don't know whether there is an osteopath or a chiropractor. There were two I went to on my way south in Ventura.

Q. There were just the two of them there in Ventura, once going and once coming, is that correct? A. That is right.

Q. And are you presently occupied with anything at all, Mr. Grigg? Are you doing anything at all right now? A. No.

Q. I see. When did you get the second Cadillac, Mr. Grigg? [64] A. When did I get it?

Q. Yes.

A. I bought it the following day after I was hurt.

Mr. Diepenbrock: I see. I have no further questions. Thank you.

Mr. Robertson: That is all, your Honor.

Mr. and Mrs. Spansel are supposed to be here. May I go out in the hall a moment?

The Marshal: What is the name?

Mr. Robertson: Spansel, Mr. and Mrs. Spansel.

The Marshal: No answer, your Honor.

Mr. Robertson: Is Mr. Anthony Perine in the courtroom? Will you step forward, sir?

ANTHONY PERINE

called as a witness on behalf of Plaintiff, sworn:

Direct Examination

By Mr. Robertson:

Q. Mr. Perine, where do you reside, sir?

A. 211 Alameda Street, West Sacramento.

Q. And what is your business or occupation?

A. Industrial Clerk for the Southern Pacific Company.

Q. How long have you been so employed?

A. Since 1942.

Q. And what were your duties or your position with the Southern Pacific Company on December 17, 1954, the day of the [65] accident?

A. Industrial Clerk.

Q. And what do those duties consist of as Industrial Clerk?

A. Tag and seal cars, inspect loads.

Q. Tag steel cars? A. Seal.

Q. Oh. And, Mr. Perine, did your duties in December, 1954, also include overseeing the Southern Pacific stockyards in West Sacramento?

A. Yes, sir.

Q. And what were your duties in that regard?

A. Well, we would feed—unload and load cars and feed if they stopped for rest.

Q. And in unloading cars what were your duties there? To see that the animals were put in the corral? A. Yes, sir.

Q. And then when the animals were in the

(Testimony of Anthony Perine.)

corral until they were shipped out what would your duties be in regard to those animals?

A. Well, if they stopped for rest they would be fed and watered and counted and then loaded when their time was up, back in the cars, the same procedure.

Q. And how long have you been engaged in having these duties with the Southern Pacific Company?

A. Since '42 outside of the Army tour. [66]

Q. You have been handling livestock as well as your other duties ever since you have been in the Southern Pacific Company? A. Yes.

Q. Now, are you on call whenever shipments happen to come in to go out there?

A. Yes, sir.

Q. And shipments come in at various hours of the day and night, I presume? A. Yes, sir.

Q. Was your attention directed to the shipment of two cars of horses and mules that arrived here in Sacramento some time prior to the happening of this accident? A. No, sir.

Q. Were you called upon on or about December 16, 1954, to go to West Sacramento Southern Pacific stockyards to unload two cars of horses and mules?

A. That particular shipment somebody slipped up and I wasn't called.

Q. Well, what do you mean you weren't called, Mr. Perine?

Mr. Wulff: Counsel, I think you are referring to a shipment that came in on the 17th; I think you

(Testimony of Anthony Perine.)

are assuming something not in evidence, it came in on the 16th, as you know.

Mr. Robertson: I am saying the 16th. [67]

Mr. Wulff: I thought you said the 17th. I beg your pardon.

Q. (By Mr. Robertson): Mr. Perine, what do you mean by "somebody slipped up" in notifying you?

A. Well, I happened to be over at my mother's at the time and I just seen them go by going over to the corral, so I went over there.

Q. What time was this?

A. That is when they came in, the 16th.

Q. December 16, 1954? A. Yes, sir.

Q. What time did they arrive?

A. I got there, I would say about 10:00 o'clock, approximately.

Q. In the morning or night?

A. Morning.

Q. So you went over there, is that correct?

A. Yes, sir.

Q. And what did you do with regard to this shipment of horses and mules?

A. Well, Coon unloaded them and I counted them and he put them in—he closed the gate and I left.

Q. Can you tell us approximately how many horses and mules were put in the corral?

A. Well, they usually run between 25 and 30. I don't remember the exact count. [68]

Q. Now, Mr. Perine, is it correct procedure

(Testimony of Anthony Perine.)

when a shipment comes in for you to go over and help them unload them and put them in a corral, or do you have an assistant?

A. I have an assistant.

Mr. Wulff: Just a moment. I object to that as too broad. It doesn't specify whether they come in for rest or are arriving at their destination. It depends upon what they come in for as to what he has to do.

The Court: The objection will be sustained.

Q. (By Mr. Robertson): Did any other Southern Pacific Company employee assist you in unloading these animals on December 16, 1954?

A. No, sir.

Mr. Wulff: Just a moment. I object to that question, that assumes something not in evidence. Mr. Coons unloaded them. Mr. Coons is the shipper, as you know, or the consignee.

Mr. Robertson: Mr. Coons is not the shipper, counsel.

Mr. Wulff: He is the consignee.

The Court: Well, it doesn't make any difference who he is. The previous testimony of this witness was that Mr. Coons unloaded them and put them in the pen and he simply counted them.

Q. (By Mr. Robertson): Was there any other Southern Pacific employee at the corral at the time the animals were unloaded?

A. No, sir. [69]

Q. Now, when the animals came in on the cars on December 16, 1954, at 10:00 o'clock a.m., were the doors locked or sealed?

(Testimony of Anthony Perine.)

A. Well, what do you mean by locked, sir? Do you mean a latch on them?

Q. Yes. A. Yes.

Q. And who removed that latch on that day?

A. Mr. Coons.

Q. Were you there when he did it?

A. Yes, sir; on one car; yes, sir.

Q. Now, then, Mr. Perine, after the animals were placed in the corral on December 16th, did you make any report to the Southern Pacific Company that they were there? A. Yes, sir.

Q. And to whom did you make that report?

A. I just called 12th Street that the horses were unloaded.

Q. 12th Street? A. Yes, sir.

Q. And what is that 12th Street?

A. Well, there is a clerk there that you notify all calls.

Q. Who did you notify?

A. I don't remember, but it was the chief clerk there.

Q. And did you make any written report concerning the fact that these mules were in the corral?

A. Yes, sir. [70]

Q. To whom did you make the written report?

A. We have a stock book that I write in.

Q. You wrote in a stock book?

A. Yes, sir.

Q. In whose possession and control is the stock book?

Mr. Wulff: I have it, counsel.

(Testimony of Anthony Perine.)

Q. (By Mr. Robertson): Is this a book that you keep in your possession or a book that you fill out daily and turn into the company?

A. It is a book that is set inside of a little door.

Mr. Robertson: Counsel, the book handed me has the date August 16th, 12:20 A.

Mr. Wulff: I beg your pardon, that is the wrong page, counsel.

Q. (By Mr. Robertson): You say this stock book is kept out at the corral?

A. No, sir, it is kept in the office at Front and J Streets.

Q. So after you phoned into the company on the 16th that they arrived, then you went down and filled out the stock book, is that correct?

A. I tell them when they are unloaded.

Q. Now, counsel has handed me here, it says, "Stock Book," and on the front it says, "R. Duke." Who is R. Duke?

A. He works with me.

Q. An S.P. employee? [71] A. Yes, sir.

Mr. Wulff: You are looking at the reloading page, counsel.

Mr. Robertson: I am 12-16-54.

Mr. Wulff: One page is loading and the other is reloading.

Q. (By Mr. Robertson): Yes. In this stock book which is dated 12-16-54, 10:00 A., is that correct? A. Yes.

Q. That means December 16, 1954, 10:00 a.m.?

A. Yes.

Q. And it says, "Shipper, Coons."

(Testimony of Anthony Perine.)

A. Yes.

Q. It is all in pencil handwriting. Is that your handwriting? A. Yes.

Q. Then it says, "AT 29117, Chute 29."

Mr. Wulff: May the record show, if your Honor please, he is referring to the left-hand page.

Mr. Robertson: Yes.

Mr. Wulff: Because the other page is not in a handwriting.

Mr. Robertson: That is right.

Q. What does that I just read to you mean?

A. Number of head.

Q. And what does, "AT 29117" mean?

A. Car number.

Q. And under that is "AT 27608, Chute No. 28"?

A. That is the head number, 28 head. [72]

Q. So that there came in that shipment then 47 head? A. Yes, sir.

Mr. Wulff: It is 57. A. 57, yes.

Q. (By Mr. Robertson): I am sorry. 57. And under that it says, "Unloaded by owner, counted by me, not called by 12th Street, happened to see stock pass," and your name? A. Yes, sir.

Q. Then you weren't notified in advance of this shipment? A. No, sir.

Q. Now, what does the chute number mean? Is that where the car is started to load them into the corral? A. Where is the chute number?

Q. Up above here, it says, "Chute number."

A. Well, we never did put down the chute number. We have just got two chutes, that is all.

(Testimony of Anthony Perine.)

Q. And was this entry that I have just read that you have just testified to, on the left-hand side of the page, made by you on the date written, 12-16-54?

A. Yes, sir.

Q. Now, Mr. Perine, on December 16, 1954, after they were loaded, what did you do then in regard to these horses and mules, if anything?

A. Afterwards?

Q. Yes. [73]

A. Nothing; he took complete charge of them.

Mr. Robertson: Move to strike as not responsive.

The Court: The motion is denied.

Mr. Robertson: May it please the Court, the question was: "What did you do in regard to these?" and he said, "Nothing; he had complete charge."

The Court: No, that is not what he said. He said, "Nothing; he took complete charge of them." So I think it is responsive to your question, "What did you do about them?"

Mr. Robertson: I think that is his opinion and conclusion, your Honor.

Q. All right, Mr. Perine, did you stay at the corral—when did you leave the corral after the horses were unloaded?

A. Oh, I stayed there about 10 or 15 minutes, counted them inside. They were in the corrals and the gate secured.

Q. Who was there at that time with the horses?

A. Mr. Coons.

(Testimony of Anthony Perine.)

Q. Anyone else?

A. Well, there were some people I didn't know.

Q. Any S.P. employees?

A. Not that I noticed.

Q. All right. Now, did you come back to the corral at all that day? A. Not that I recall.

Q. You weren't back there at all that day? [74]

A. No, sir.

Q. Do you know of your own knowledge, therefore, or did you observe—strike that.

Did you observe any other persons at the corral the rest of the day then?

A. Let's see; well, not that I know.

Q. Now, Mr. Perine, did you visit the corrals at any time after you first checked the horses and mules in until the time of the accident?

A. Yes, sir.

Q. When did you next go out to the corrals where the horses and mules were still there in the corrals? A. Next morning.

Q. What time did you arrive there?

A. I was there about 10:00 o'clock.

Q. Tell us what you observed when you arrived there.

A. Well, Mr. Coons had the horses outside of the corrals and they were eating on some bean straw along the outside of the corrals.

Q. And would that be outside of the corral area?

A. It is in the same area but it is outside the gate.

Q. Was there any enclosure like a fence?

(Testimony of Anthony Perine.)

A. Well, there was a ricochet of a fence on one end on the outside.

Q. Mr. Perine, I am going to show you a picture bearing the [75] photographer's identification number 11346-9 and ask you if that picture fairly represents the area.

Mr. Wulff: If your Honor please, in the interests of time I am perfectly happy to stipulate that——

A. Yes, it is.

Mr. Wulff: ——that these pictures show the conditions existing at the time they were taken, that is, on September 27, 1955. Now, there is a growth of weeds there that grew the preceding growing season. I can't stipulate that those weeds were there, because they grew during the period since December 16, 1954.

The Court: Was there any material change in the fence as far as you can now see?

Mr. Wulff: Well, I can't answer that because the fence is constantly being repaired. I can tell you the number of times it has been repaired since.

Mr. Robertson: Yes, there is, your Honor. I am only going to use a couple of these pictures. I am not going into the question of the corral at this time. Perhaps we can speed it up, the witness might be able to——

Q. Does this picture showing the area adjacent to the corral fairly depict what the area looked like on the day of the accident?

A. Yes, sir.

Mr. Robertson: I would like to have this picture,

(Testimony of Anthony Perine.)

photographer's number 11346-9 admitted as Plaintiff's Exhibit next in order, your Honor.

The Court: I am going to mark it Plaintiff's Exhibit No. 9 for identification. I am not sure I see the materiality of it at this time. Plaintiff's 9 for identification.

(The photograph referred to was marked Plaintiff's Exhibit No. 9 for identification.)

Q. (By Mr. Robertson): I will show you another picture, 11346-10, and ask you if that picture fairly depicts the condition that existed at the front gate of the corral on the day of the accident?

A. That is a side gate. The front gate is over here.

Q. Well, the side gate, then.

A. I don't think that is the same gate.

Q. You think that is a new gate?

A. Yes, sir.

Q. Other than a new gate put on, does the picture fairly show the layout of the ground and the physical structure of the corral on the day of the accident?

A. Yes, sir.

Q. It does. I will ask that this be admitted——

Mr. Wulff: Same objection, your Honor.

The Court: For identification only. Plaintiff's Exhibit 10 for identification.

(The photograph referred to was marked Plaintiff's Exhibit No. 10 for [77] identification.)

(Testimony of Anthony Perine.)

Q. (By Mr. Robertson): Now, Mr. Perine, Plaintiff's Exhibit 9, when you arrived on the morning of December 17, 1954, does this picture show the general area where the horses and mules were being fed or grazed?

A. Well, the general area, yes.

Q. Were they being grazed or fed in the general area depicted in Plaintiff's Exhibit No. 9 for identification, the picture I am showing you?

A. Yes, sir.

Q. And outside of the corral?

A. Yes, sir, that is the general area.

Mr. Robertson: I will move to admit this now, your Honor, in evidence.

The Court: The motion is denied.

Q. (By Mr. Robertson): I will show you Plaintiff's Exhibit 10 for identification and ask you if that is an extension of the area alongside the corrals of the other photograph, where the animals were also grazing on the day of the accident?

A. I don't quite get the question.

Q. Plaintiff's Exhibit 9 for identification shows the general area, which would be the westerly area from the side gate, and then the hay pile appears to the right of Plaintiff's 9.

Now, Plaintiff's 10——

A. That is where they were, right in this location (indicating).

Q. Yes. So that if you put Plaintiff's 10, the photograph, [78] in your right hand, to the right of

(Testimony of Anthony Perine.)

Plaintiff's 9, it shows the general area, is that correct? A. Yes.

Q. Were the animals grazing all through that area? A. Some, yes.

Q. And is there a road immediately south of this area depicted in these two pictures?

A. Yes, sir.

Q. And is that a public road? A. Yes, sir.

Q. And are there other roads leading off at right angles from this road to the main highway?

A. Well, it doesn't go to the main highway, but there is a road there that goes west.

Q. And is there a spur track of some sort that leads from the general area of the stockyards down to the highway? A. Yes, sir.

Q. And crosses the highway by an overpass?

A. Yes, sir.

Q. How many horses and mules did you see being grazed outside the corral on December 17th in the morning when you came there?

A. I didn't count them.

Q. Can you give us an estimate? Were there any in the corral?

A. I don't think there was any in the corrals.

Q. So that your best memory now is that all of them were outside? [79]

A. Well, I seen a few of them all the way down. I didn't check the corrals, but I seen them outside. I don't know how many were outside. I didn't check to see if there was any inside.

(Testimony of Anthony Perine.)

Q. Approximately how much of an area were they spread out in?

A. I would say two or three hundred feet.

Q. Did you observe anybody who appeared to be guarding them or attending them?

A. Yes, sir.

Q. And how many people did you observe?

A. One.

Q. And who was that? A. Mr. Coons.

Q. And did you speak to Mr. Coons at that time?

A. Just maybe said hello and that is all.

Q. And how long did you remain there?

A. Just a few minutes.

Q. Did you make any entries in a stock book or any kind of a book at that time? A. No, sir.

Q. And did you make any request of Mr. Coons to put the mules back in the corral?

A. No, sir.

Q. And when you left the corral where did you go?

A. I think I went over to my mother's, who lives in that area. [80]

Q. Were you on duty at the time you went down there on the morning of the accident?

A. No, sir.

Q. What were your duties——

Mr. Wulff: Are you referring to 10:00 o'clock, at the time he went there that morning?

Mr. Robertson: Yes.

Q. What were your duty hours on that day, December 16, 1954? A. Four to midnight.

(Testimony of Anthony Perine.)

Q. And you went over to your mother's. Now, at any time during the day of December 17, 1954, did you return to the stockyards? A. Yes, sir.

Q. When was that?

A. About 15 minutes to four.

Q. And were you on your way to work at that time? A. Yes, sir.

Q. And how long were you at the stockyards at that time? A. Not very long.

Q. And what did you observe at that time?

A. Mr. Coons was still there at that time.

Q. Did you observe any horses and mules at that time? A. Yes, sir.

Q. And where were they?

A. Still in the same general area.

Q. Were there any mules and horses in the corrals at this time? [81] A. I didn't check?

Q. And was there just Mr. Coons there watching them? A. That is all I observed, yes.

Q. And did you at that time have any conversation with Mr. Coons?

A. Not that I remember.

Q. You didn't instruct him to put them back in the yards? A. No, sir.

Q. Now, other than filling in this stock book we have discussed here a moment ago, did you fill in any other report for the S.P. Company regarding these mules and horses that were at the corral?

A. No, sir.

Q. And was it part of your general duties at the corrals to feed and water livestock in the event the

(Testimony of Anthony Perine.)

consignee did not feed them? A. Yes, sir.

Q. On December 14, 1954, did you have any special instructions from the Southern Pacific Company concerning when you would feed livestock that arrived and when you would not feed them?

Mr. Wulff: I object to that. You mean livestock that arrived at the point of destination or do you mean livestock that arrived there for rest and water? It is a different situation.

Mr. Robertson: I mean livestock that arrived at the corral [82] that he had a duty to look over.

Mr. Wulff: For any purpose?

Mr. Robertson: Yes.

Mr. Wulff Do you understand that, Witness?

A. Well, if it is consigned to Sacramento we just check to see the condition and the number in the unloading, and the consignee takes charge of the feeding and watering, we don't feed and water them.

Q. (By Mr. Robertson): And who gives the instructions, who gave you the instructions?

A. Those were instructions from the Southern Pacific Company.

Q. Are those instructions given to you orally or in writing? A. Well, orally.

Q. Do you recall who gave them to you and when they were given to you?

A. Well, Mr. Mills told me about it years ago.

Q. At any time when animals come into the stockyards, regardless of what purpose they come into the Southern Pacific stockyards, before they

(Testimony of Anthony Perine.)

can be fed by the owner-consignee, does special permission have to be requested by the owner-consignee to do that?

A. If he wants them fed, it has to request it.

Q. Request what? A. For them to be fed.

Q. But the point I am making is: If I were to bring into your [83] stockyards 50 horses and mules and wished to feed them myself, do I have to request special permission to do that or not?

A. Would they be consigned to Sacramento final destination?

Q. They would be brought into your stockyards—is there a distinction? A. Yes, there is.

Q. What is the distinction?

A. Well, when they are consigned to Sacramento we do not feed them.

Q. Supposing that no one were there to receive them, would you still not feed them?

A. Well, I would notify the office that I can't find the consignee.

Q. Supposing that no one was there to receive them, you would still not feed them?

A. Well, I would notify the office that I can't find the consignee.

Q. Supposing they are not consigned to Sacramento but are merely stopping here in transit, is there a different rule? A. Yes.

Q. What is that?

A. I call up Post Street and they tell me what amount to feed them and they are unloaded and put

(Testimony of Anthony Perine.)

in the corrals and fed and watered and have the rest period.

Q. By the Southern Pacific? [84]

A. Yes.

Q. If the owner desires to feed them while they are pulled off here in transit, does he have to request special permission to do so?

A. I don't remember any of them feeding here.

Q. Well, what are your instructions in that regard?

A. Well, I get my instructions—my instructions, I think, come off the bill of lading.

Q. You, a moment ago, said there was a distinction; if they are shipped directly to Sacramento and the shipment ends here, then the owner feeds them, is that correct?

A. He takes possession, yes, sir.

Q. But if they are stopped in transit here, in transshipment, then you feed them, is that correct?

A. Yes, I take possession.

Q. But if the owner desires to feed them, under that circumstance does he have to request permission to do so?

A. I couldn't answer that question.

Q. Do you know whether Mr. Coons requested permission to feed his own horses and mules in this matter, either on December 16th or December 17th?

A. He always fed his own stock.

Q. Pardon me?

A. He always fed his own stock.

Q. I am talking about this instance. [85]

(Testimony of Anthony Perine.)

Mr. Wulff: That answers the question.

A. He fed them, yes.

Q. (By Mr. Robertson): Pardon me?

A. He fed them.

Q. I didn't ask you that. I am asking did he make any request of your knowledge, either on December 16th or December 17th of you that he could feed his own animals himself?

A. I don't remember.

Mr. Robertson: Counsel, would you refer to Page 7 of this gentleman's deposition and stipulate that the questions were asked and answers given?

Mr. Wulff: That is correct.

Mr. Robertson: May I read the questions and answers to the witness?

Mr. Wulff: Yes.

Q. (By Mr. Robertson): You recall giving that deposition? A. Yes, sir.

Q. I will ask you if those questions were asked and these answers given, line 3, page 7:

"Q. Those animals were placed in the Washington corral? A. Yes, sir.

"Q. Were there any other animals in the corral at the time, other than those belonging to Mr. Coons? A. I don't know. [86]

"Q. Were any arrangements made with Mr. Coons for the feeding and watering of the livestock?

"A. Well, he watered and fed his own.

"Q. Did he make any request that he feed and water his own?

(Testimony of Anthony Perine.)

“A. He would have to, I guess, or they wouldn’t let him.

“Q. Is it true that these animals were being held in the Washington corral pending shipment to Santa Rosa? A. I don’t know.”

You gave those answers, is that correct?

A. Yes, sir.

Mr. Wulff: I think you misread that. It says “pending reshipment to Santa Rosa.” I think you left the word “re” out. You said, “pending shipment to Santa Rosa.” It is “pending reshipment.”

Mr. Robertson: Pending reshipment.

Q. Now, after you left the corral around a quarter to four on Friday, December 17, 1954, where did you go?

A. I went to work, Front and J Streets.

Q. 12th Street? A. Front and J Streets.

Q. What were your duties down there?

A. Industrial Clerk.

Q. Filling out papers and things? [87]

A. Tagging and sealing cars and so forth.

Q. Did you make any report orally or in writing at the time you went down to work about these horses that were in the corral being fed outside the corral? A. No, sir.

Q. Were you given any instructions on December 17, 1954, by any of your superiors concerning those horses and mules at the corral at that time?

A. Could I have that question again, please?

Q. Yes. When you arrived at work on December 16, 1954, after seeing those horses out there at a

(Testimony of Anthony Perine.)

quarter to four, when you arrived at work, did you receive any instructions concerning the horses and mules that were out there? A. No, sir.

Q. Now, Mr. Perine, what type of lock was on the side gate of the corral on December 17, 1954? Which side gate is depicted in Plaintiff's 10 for identification?

Mr. Wulff: What is the question?

Q. (By Mr. Robertson): What type of lock was on the side gate of the corral on December 16, 1954, which side gate is depicted here in Plaintiff's 10?

Mr. Wulff: What is the materiality of that? The horses weren't in the corral on December 16.

Mr. Robertson: This is preliminary, your Honor. There will be testimony—— [88]

A. I don't know. I never used that gate. I couldn't tell you that.

Q. Do you know whether it was chained or locked or whether there was a sliding bolt, or you don't know? A. I don't know.

Q. How often did you visit the corrals within the last several months prior to December 16, 1954?

A. Oh, I couldn't say.

Q. Have you any estimate? Once a week, once a day?

A. I have been by there in my tour of duties.

Q. Pardon me?

A. I have been by there in my tour of duties.

Q. Have you any estimate how often you went by?

(Testimony of Anthony Perine.)

A. I would say twice a week I go by the corrals.

Q. You don't have any recollection of how this gate was fastened? A. No, I don't.

Q. Can you tell us, please, on December 16, 1954, what the condition was inside of the corral, was it dry, was it muddy, or just what was the condition?

A. Muddy, some of it.

Q. Excuse me? A. Muddy.

Q. Have you any idea how deep the mud was in there?

Mr. Wulff: What day are you talking about?

Mr. Robertson: Inside the corral.

Mr. Wulff: I am asking you what time. After the rain, of course, it is muddy. What time are you talking about?

Mr. Robertson: I am talking about 10:00 a.m. and 4:00 p.m., the two times he visited that on December 16, 1954.

A. I would say it was pretty muddy.

Q. Pretty muddy. And would that be generally all over the corral? A. Yes, I would say.

Q. And do you have any idea how deep the mud was in there? A. Well, no, sir.

Q. Have you fed livestock quite a bit?

A. Not lately, sir.

Q. Well, prior to the accident had you fed livestock at the S.P. corral on numerous occasions?

A. Yes, when they are in transit.

Q. Would it be practical with the mud that was in the corral on December 17, 1954, to feed livestock in the corral? A. Yes, sir.

(Testimony of Anthony Perine.)

Q. The fact that that mud was in there would not affect the feeding of them in any way?

A. Well, they have bins to feed them in.

Q. And would the animals, the 57 animals in there be able to lay down after they ate in there without getting all muddy?

A. I guess not. [90]

The Court: What do you mean by bins? Are you talking about mangers?

The Witness: Well, I call them bins. They are made like a big box.

The Court: Well, how big are they?

The Witness: I guess they hold a couple or three bales of hay.

The Court: Well, are they square?

The Witness: Square.

The Court: Where are they?

The Witness: They are inside the corrals.

The Court: Where inside the corrals: out in the middle, next to the fence, or——

The Witness: Well, they are about right next to the fence. I guess you would say off a little ways.

The Court: How long are they?

The Witness: I don't know exactly. I would say about—oh, I would say about four by six.

The Court: How many of them?

The Witness: I think there might be about four or five of them there. I don't know for sure.

Q. (By Mr. Robertson): Mr. Perine, when you observed on December 17th the horses and mules out of the corral, isn't it a fact there was hay put

(Testimony of Anthony Perine.)

down for them to eat and some of them were actually eating hay outside?

A. They were munching along there, and there used to be a pile of bean straw that was there, and some was eating there [91] and some was stretched out, too.

Q. Did you see any hay laid down for them to eat, actual hay that had been brought there and laid down?

A. I didn't observe that.

Q. Now, was there any other S.P. employees on duty at the corral on the morning of December 16th when these animals arrived in these two cars?

A. Not that I know of.

Q. When you got there were the cars on the siding stopped and by themselves?

A. They were there stopped.

Q. Stopped. And were the doors on the cars locked and sealed?

A. Well, Coons had had one unloaded and when I arrived he was on the second car.

Q. How did he load them, on a chute, or take them down off the door and lead them around and put them in the corral, or how?

A. We have a carriage that comes up.

Q. A carriage?

A. Yes, a chute that pushes up to the car door and they walk.

Q. Aren't these doors locked in any way on the freight car when livestock are moved?

A. Not horses.

Q. Anybody can open the doors?

(Testimony of Anthony Perine.)

A. We do not seal horses or cattle. [92]

Q. And he had one car completely unloaded before you arrived? A. Yes, sir.

Q. And the other car, I assume the chute was put on its door and unloaded?

A. No. I was there when that took place.

Q. And has Mr. Coons shipped other shipments with you prior to this? A. Yes, sir.

Q. Many of them? A. Yes, sir.

Q. He used the yards there? A. Yes, sir.

The Court: Did he use the same chute to unload both cars?

The Witness: No, sir. There are two chutes.

The Court: In other words, the cars were spotted at the chutes?

The Witness: Yes, sir.

The Court: So you didn't have to bar the cars to get them from the door to the chutes?

The Witness: No, sir.

Q. (By Mr. Robertson): Now, after all the animals got in, did you go around the corral to see that all the gates were closed and shut?

A. The gates where the horses is, yes, sir.

Q. So that these horses and mules were in one portion of the [93] corral and the only way they could get out was through one gate, is that correct?

A. Well, they would have to go through the gate into the hallway, and then out.

Q. Yes. Did you see that both of those gates were closed and secured before you left?

(Testimony of Anthony Perine.)

A. No, he took care of everything. I just counted them.

Q. I believe you said previously, before you left the gates were closed. Do you recall whether they were closed or were not closed?

A. Well, the horses were in there, so they were closed.

Q. They were closed?

A. I assume they were, yes, sir.

Q. Well, do you know? Do you know whether they were or were not?

A. Well, I would say they were closed.

Q. All right. Now, at that time, December 16, 1954, you having been in charge of the corral with animals being put in there, was there a chain with a lock where you locked the gate, or was there not any lock there?

A. I don't remember. I don't think there was.

Q. You don't think there was any lock on them?

A. No, sir.

Q. In other words, there would be just a sliding board that is depicted in the picture that this slides over and locks? [94]

A. That is the outside gate.

Q. Yes. And this chain and lock that is on the picture there was not on that gate at the time of the accident?

A. I don't think it was, sir.

Q. Now, Mr. Perine, were you notified at any time on December 17, 1954, the day of the accident, that these animals had escaped or had gotten loose?

A. Yes, sir.

(Testimony of Anthony Perine.)

Q. And when were you notified?

A. I was notified approximately 8:00 o'clock, 8:30.

Q. By whom were you notified?

A. Mr. McKenzie.

Q. Who is Mr. McKenzie.

A. He is head waybiller.

Q. Head what? A. Waybiller.

Q. At 8:00 o'clock, you say?

A. Well, thereabouts; 8:00 or 8:30, I don't remember exactly.

Q. By Mr. McKenzie, head waybill clerk?

A. Yes, sir.

Q. And he is employed by the Southern Pacific?

A. Yes, sir.

Q. Did he give you any instructions at that time concerning the mules that were loose?

A. He told me to call the chief dispatcher's office. [95]

Q. What did he tell you to tell the chief dispatcher?

A. Well, he heard there were some horses running loose.

Q. Were you given any other instructions at that time?

A. Well, I called the chief dispatcher's office and whoever answered the phone there said there were horses down on the right-of-way.

Q. Down the right-of-way? A. Yes, sir.

Q. Did he state which right-of-way?

A. The S.P. right-of-way.

(Testimony of Anthony Perine.)

Q. Did he say whereabouts on the right-of-way?

A. Well, he didn't pinpoint that, no, sir.

Q. And is he an employee of the Southern Pacific? A. Yes, sir.

Q. And what is his name?

A. I don't know, sir.

Q. And did he give you any instructions what to do about these animals that were loose on the right-of-way?

A. No, he didn't say, he just said there were horses roaming on the right-of-way, that is all.

Q. As I understand it, Mr. McKenzie told you about it and told you to call the dispatcher, is that it? A. I think that is right.

Q. You notified the dispatcher that this happened, is that correct? [96]

A. I think the chief dispatcher called him for me.

Q. The chief dispatcher called him?

A. That is the phone that I work by, that extension.

Q. Did anybody working for the Southern Pacific instruct you to go out and assist in rounding up the mules? A. No, sir.

Q. Did you go out and assist to round up the mules? A. Yes, sir.

Q. You did. And when did you go out to assist to round up the mules?

A. Oh, I guess it was around about 9:00 o'clock, but we didn't find any.

(Testimony of Anthony Perine.)

Q. Did anybody go with you that worked for the Southern Pacific?

A. Well, Mr. Duke was already there some place and we finally met somewhere.

Q. You met Mr. Duke out there?

A. Yes, sir.

Q. And he is your assistant, is that correct?

A. Yes, sir.

Q. At that time he was employed by the Southern Pacific Company, is that correct?

A. Yes, sir.

Q. And you just went out there on your own, is that it, or did somebody tell you to go out there? [97]

A. I just took it for granted I was supposed to go.

Q. And you went out and searched for the mules, and did you ultimately find the mules?

A. I never saw them.

Q. You never saw them? A. No, sir.

Q. At any time while you were out did you go back over to the corral and did you see them back in the corral?

A. You mean after the 17th, in the evening?

Q. Yes, that evening at any time did you go over to find out if they had got them back?

A. Oh, yes.

Q. When did you go over to the corral?

A. I was over there about, I guess, around 9:00 o'clock. We drove around looking for them and then we went back Saturday morning.

(Testimony of Anthony Perine.)

Q. Now when you went back to look for them, you were in a car, is that correct?

A. We all was, yes, sir.

Q. Where did you go to look for them? Did you first go to the corral?

A. Well, I know we was driving around.

Q. Well did you go to the corral at any time while you were looking for them?

A. Yes, sir. [98]

Q. Did you stop at the corral and look around?

A. Yes.

Q. Did you observe any gates open at that time?

A. No, I don't recall.

Q. You don't recall whether you did or didn't?

A. No, sir.

Q. After you went to the corral and looked around, were there any horses or mules in the corral at that time?

A. Well, I didn't go in the corral that time, either.

Q. Well, you can stand on the road and see in the corrals, can't you?

A. Well, this was dark, this is evening.

Q. Well, do I understand you didn't bother to go out and look to see if there were any horses or not?

A. Well, I met Duke and he told me there were horses running around, so I went with him.

Q. So it is your testimony you didn't look in the corral at all to see if there were still some there?

A. I don't remember exactly if I looked or not.

(Testimony of Anthony Perine.)

I know I met Duke and then we proceeded together.

Q. And you met Duke at the corral?

A. Thereabouts, yes.

Q. And then you and Duke proceeded from there? A. Yes.

Q. Which route did you proceed on, if you remember? [99]

A. Well, we just went up and down the roads.

Q. Up and down roads. Were there a lot of roads around the corral that are open roads there, private roads? A. There is a few, yes.

Q. A lot of routes that the mules could have taken? A. Yes, sir.

Q. Did you see any mules up and down the roads there? A. No.

Q. Is it your testimony that you and Duke never found the mules then, is that correct?

Mr. Wulff: He didn't so testify.

Q. (By Mr. Robertson): Well, did you——

A. Well, we found some in the morning, we found three in the morning.

Q. You found some the next morning?

A. Yes, sir.

Q. Where did you find them?

A. They were roaming around there, around the corrals.

Q. Did you put them in the corrals?

A. Yes.

Q. Who was with you at that time?

A. Duke.

Q. Did you lock the gate? A. Yes.

(Testimony of Anthony Perine.)

Q. Now the night of the accident after you looked around for [100] a long time, you say you hadn't found any, is that correct?

A. Yes, sir.

Q. Did you come back to the corral later that night to see if any of them had come back?

A. I don't remember.

Q. You don't remember? A. No.

Q. You do remember going back the next morning, is that correct?

A. We stayed that evening and then we went on in the morning.

Q. And how long were you and Duke out looking for them the night before?

A. I would say a couple or three hours, anyway.

Q. Did you run across anybody else from the Southern Pacific looking for them?

A. I don't recall, no, sir.

Q. So far as you know there was just you and Duke from the Southern Pacific? A. Yes, sir.

Q. Now, the next morning when you came back to the corral, were there some mules in the corral?

A. Yes, sir.

Q. And there were some outside the corral, is that correct? A. There were three outside.

Q. Did you count them the next morning? [101]

A. Yes, sir.

Q. How many were there the next morning?

A. We had the full count outside of the two gone.

Q. Two were killed? A. Yes, sir.

(Testimony of Anthony Perine.)

Q. And was there another injured or something?

A. Yes, sir.

Q. Was there just the one mule in the corral that was injured? A. That is all I observed.

Q. You didn't observe any others? A. No.

Q. What was the type of injury that mule had?

A. I don't remember that.

Q. Are you familiar with the handwriting of R. Duke? A. Yes, sir.

Q. I will show you this book we referred to a moment ago and ask you to look at the right page. Is that the handwriting of R. Duke?

A. Yes, sir.

Q. And is this a book that is required by your company to be kept? A. Yes, sir.

Q. Your instructions are to keep it?

A. Yes, sir.

Q. Now, I notice in there it says—was this entry prepared [102] in your presence by Mr. Duke?

A. No, sir.

Q. I notice it says there, "28 and 27." That would be 55 head, is that correct, that were returned?

Mr. Wulff: Counsel, I will stipulate that the book is kept in the due course of business.

Mr. Robertson: You have no objection——

Mr. Wulff: I have no objection.

Mr. Robertson: I will read it into the evidence. It says, "28 and 27"—obviously that is 55 head.

Mr. Wulff: Counsel, please, the left-hand side is for the unloading.

(Testimony of Anthony Perine.)

Mr. Robertson: Yes.

Mr. Wulff: And the right-hand side for when it is diverted or reshipped.

Mr. Robertson: And it says, "December 18, 1954, 5:00 p.m.; consignee, H. L. Coons. Horses escaped from corral, ran on Yolo Freeway and two killed by autos. Turned over to reduction. One had bad lacerations of the front shoulder when corralled." Signed "R.L." I think it is, "Duke."

A. Robert L.

Mr. Wulff: May I have a stipulation, if you want to introduce that in evidence, that we can have a photostatic copy made and the original withdrawn?

Mr. Robertson: Yes. [103]

I would like at this time to offer the stock book, as it is called, both entries, left and right, as plaintiff's exhibit next in order, your Honor.

The Court: Let that be received and marked Plaintiff's Exhibit 11 at this time, with the understanding that the defendant may substitute photostatic copies of those two pages. At the present time those are the only pertinent pages in the book.

Mr. Robertson: Thank you, your Honor.

(The document referred to was marked Plaintiff's Exhibit No. 11 in evidence.)

Mr. Robertson: And if it please the Court, again, having put in the testimony of Mr. Perine, I would like to reoffer at this time Plaintiff's Exhibits 9

(Testimony of Anthony Perine.)

and 10 for identification in evidence. I think they all tie into his testimony, may it please the Court.

Mr. Wulff: Same objection.

The Court: The objection is sustained. I don't see that they are any help to me at this time at all. If you have a map of that area there, as I have already suggested, it would be of some help. These photographs were taken ten months later, and by the law of nature things have changed considerably, and if they are for illustrative purposes only, a map would be better.

Mr. Robertson: I am offering them only for the limited [104] purpose, your Honor, of showing this open area unenclosed where these horses and mules were being fed outside the corral, as this witness has testified of his own express knowledge. I am not offering them to show——

The Court: If the witness has testified to it, what is to be gained by putting the photographs in?

Mr. Robertson: I think your Honor is right. Thank you.

Q. Mr. Perine, one or two other things: The day following this accident the remaining mules that were in the S.P. corral were shipped out again, is that correct? A. Yes, sir.

Q. Do you know where they were shipped to?

A. I think they went to Petaluma.

Q. The two box cars that brought these mules, did they remain spotted there at the corrals from the 16th to the 18th of December?

A. I don't remember that.

(Testimony of Anthony Perine.)

Q. You don't have any recollection one way or the other? A. No, sir.

Q. Did you supervise their loading for shipment to Petaluma? A. I was there, yes.

Q. And was Mr. Coons there?

A. I think he was, sir.

Q. When they were reloaded and shipped out, did you give him any kind of receipt for the animals, or any document of any [105] kind?

A. He had to make that before the animals were shipped out. Before I got notified to load them, he had to make a bill out for them.

Q. He made that out at the company, did he?

A. Yes, before they called me to load them.

Q. And then when he came out to the stockyard and you were there, when they were loaded did he give you any paper or did you give him any document of any kind? A. No, sir.

Q. When the mules were brought in on the 16th of December and loaded in the pen, did you give him any document in writing or did he give you any document in writing? A. No, sir.

The Court: Who had the waybill on these animals?

The Witness: I guess it is 12th Street, sir.

Mr. Robertson: That is all, your Honor.

The Court: Any questions, Mr. Wulff?

Mr. Wulff: Yes.

The Court: Go ahead.

(Testimony of Anthony Perine.)

Cross-Examination

By Mr. Wulff:

Q. I think you testified, I am not too clear, that when you came there about 10:00 o'clock in the morning of the 16th, Mr. Coons, who is the—was he the owner, do you know, of the horses? [106]

A. Yes, sir.

Q. And was he the consignee, do you know that?

A. I didn't know it at the time, but I seen him there, so I knew that they were his.

Mr. Robertson: I will move to strike that as calling for an opinion and conclusion of the witness.

The Court: The last portion may go out; the portion of it that "I saw him there" may stand, the rest may go out.

Mr. Robertson: Yes, thank you.

Q. (By Mr. Wulff): Now, Mr. Perine, did Mr. Coons receive a good many shipments of horses at the Washington corral?

A. Yes, sir.

Q. Prior to this time?

A. Yes, sir.

Q. Can you give the Court any idea how many shipments came in, do you know?

A. Oh, I would say anywhere from 30 to 50 loads, anyway.

Q. And were they generally horses, what are called "chicken horses," bought for chicken feed?

A. Yes.

Q. And on these prior to this time did Mr. Coons carry out the same policy and practices?

A. Yes, sir.

Q. That is, he unloaded them?

(Testimony of Anthony Perine.)

A. Yes, sir. [107]

Q. And fed them and watered them?

A. Yes.

Q. And took complete charge of them?

A. Yes.

Q. When you saw them on that day, you expected the same thing to occur again, did you not?

A. Yes, sir.

Mr. Robertson: I object to that, your Honor, as calling for an opinion and conclusion of the witness and not the best evidence. The uniform livestock contract that we have made demand for is the best evidence. We have filed a written demand——

Mr. Wulff: I understand, but——

The Court: Now, wait a minute, both of you. The question that is before this Court is the question of negligence, and I think that the usual and ordinary practice is of some value. I will let him answer. There is no contractual liability before this Court at this time.

Q. (By Mr. Wulff): Now, did Mr. Coons supply the feed that was fed to these horses?

A. Yes, sir.

Q. Do you know what type of feed it was?

A. It looked like bean straw.

Q. Bean straw. And where did he have it piled with reference to the corral, do you recall? [108]

A. In front of the corral.

Q. Outside of the wooden area?

A. Yes, sir.

(Testimony of Anthony Perine.)

Q. Now, was that the same bean straw that you testified to that the horses were eating on?

A. Yes, sir.

Q. The next day? A. Yes, sir.

Q. Now, on the 16th and 17th of December, did you know whether Mr. Coons was going to ship the horses himself or truck them away from there, or he was going to reship them over the rails, did you know that? A. No, sir.

Q. Now, in the past sometimes, did he not sometimes ship them away by truck from the corral?

A. Yes, sir.

Q. And sometimes he diverted them to Santa Rosa and other places? A. Yes, sir.

Q. Now, when a cattle shipment is consigned to Sacramento at its point of destination, I believe you testified you did not feed any cattle unless the consignee could not be found? A. Yes, sir.

Q. Now, in this case Mr. Coons was the consignee? Did you know that? [109]

A. Yes, sir.

The Court: You used the term "cattle." I assume you are referring to animals or——

Mr. Wulff: Livestock.

The Court: ——livestock. As far as I know there are no cattle involved in this case, is there?

Mr. Robertson: No, your Honor. It is all horses.

Q. (By Mr. Wulff): Now, can you tell us approximately how far—I will withdraw the question.

Did you see the dead horses that were killed in this accident? A. No, sir.

(Testimony of Anthony Perine.)

Q. —on the highway? A. No, sir.

Q. You didn't order them to the reduction works, did you? A. Pardon me?

Q. Did you order these horses to be carried to the reduction works? A. Yes, sir.

Q. Did you see where they were located?

A. No, sir.

Q. Do you know whether Mr. Coons ever supplied any locks or means of fastening the gates other than by the wooden bar?

Mr. Robertson: Just a moment. I object to that as assuming something not in evidence. The corrals are owned by [110] the S. P., not by Mr. Coons.

Mr. Wulff: Mr. Coons had the use and enjoyment of it.

The Court: I think the question is immaterial. I will sustain the objection on that ground.

Q. (By Mr. Wulff): Now, you spoke about feed bins. Did each corral have a feed bin?

A. Of one type or another, yes.

Q. One type or another. Were there two types of bins? A. There is three types.

Q. That were used over there? A. Yes.

Q. Now, just describe each type that were used.

A. You want me to describe them?

Q. Yes.

A. Well, there is some made in a box form, and then there is one that is made like a big box, and then there is a kind that comes straight down like a manger.

Q. Now, irrespective of what type, could hay,

(Testimony of Anthony Perine.)

beans, or hay, as the case may be, be fed to them without getting in the mud? A. Yes.

Q. And that was the condition existing on the 16th and 17th days of December?

A. Yes, sir.

Q. Did you see any hay there?

A. Just beans. [111]

Q. That is all you saw? A. Yes, sir.

Q. Now, I understand you got a call, they asked you to call the chief dispatcher and you talked to the chief dispatcher in Sacramento?

A. Talked to his office, yes, sir.

Q. And he told you that there were horses on the S. P. right-of-way? A. Yes, sir.

Q. Tell the Court where that S. P. right-of-way would extend. Is it the main line track or——

A. Yes, it is a main line track.

Q. And do you know whether or not there were any slow orders given then because there were horses loose on the main line track?

Mr. Robertson: Objected to——

The Court: Sustained.

Mr. Robertson: ——as incompetent, irrelevant and immaterial. This witness——

The Court: Sustained.

Mr. Wulff: May I make an offer, if the Court please? The reason why he was called was that there were horses loose on the main line track, and his job was to get them off of the main line track.

The Court: I am away ahead of you. I have already [112] supposed that that is why you were offering that testimony. But whether any slow

(Testimony of Anthony Perine.)

orders were given or not wouldn't have any bearing upon this case at all.

Mr. Wulff: Because the obligation of railroad men is to go five miles an hour, and the idea is to get rid of that slow order so that trains may operate at the usual rate of speed.

The Court: I understand all that. In other words, when it is reported that there are animals on the right-of-way, if it is an enclosed right-of-way the railroad trains run at their own risk up until the time they get those animals off of there.

Mr. Wulff: And the S. P. gives slow orders to all their train operators——

The Court: Well, whether they did or didn't, maybe—if there was someone suing about the value of the stock, I might be inclined to listen to your testimony about whether there were slow orders given or weren't given, but the animals were way over on the highway, they were not on the right-of-way. I got the purpose of your offer.

Q. (By Mr. Wulff): I assume you went over there then with the idea in mind of rounding up the cattle or the livestock, did you not?

Mr. Robertson: I object to that as calling for an opinion and conclusion of the witness.

The Court: Well, I think the answer to that is going [113] to be no, anyhow, because there is no cattle involved.

Mr. Wulff: Livestock. I beg your pardon. Let's say horses and mules so it won't be confusing.

(Testimony of Anthony Perine.)

Q. I am trying to determine what was your purpose of going there.

A. It was to get them off—get them in the corrals.

Q. You knew, did you not, that so long as horses were loose, they could get back on the right-of-way?

A. We knew they were still out, yes, sir.

Q. You knew that?

A. Well, I presumed that.

Q. Therefore it was your job to get them in?

A. Yes, sir.

Q. Now, when you came to the corral around 9:00 o'clock that night, did you make any inquiries to find out how many mules were loose or how many mules were back in the corral?

A. I talked it over with Duke, yes.

Q. Did he know?

A. He knew some were missing, yes, sir.

Q. He knew there were some in the corral and some were missing?

A. Yes, sir.

Mr. Wulff: I think that is all.

Redirect Examination

By Mr. Robertson:

Q. Mr. Perine, there is no outside fence enclosure outside of the corral itself, is there, where these [114] mules were grazing?

A. Some of it was and some of it wasn't.

Q. There was an opening where they could get

(Testimony of Anthony Perine.)

out and go down the road somewhere, is that correct? A. I would say so.

Q. And in whose name did you have the mules sent to the reduction plant, the dead mules?

A. I don't—probably said S. P. so he could find them.

Q. I didn't hear that.

A. I don't know exactly what I told them. I think I told them there was two dead horses to pick up.

Q. Did you contact the reduction plant directly?

A. I have a phone there, yes, sir.

Q. Did you tell them who you were and you were with the S. P. Company? A. Yes, sir.

Q. Did you ask them to pick up the mules?

A. Yes, sir.

Q. And take them over to the reduction plant?

A. Yes, sir.

Q. For S. P. Company? A. Yes, sir.

Q. What is the name of the reduction plant?

A. I think it is Marks Bone something, they call it.

Q. March Bone? Do you know where that is located? [115]

A. I think it is out here towards—I have never been to the plant.

Q. Out west of Sacramento somewhere?

A. I think so, yes, sir.

Q. One other thing, Mr. Perine, when you feed animals in that corral where do you feed them when there is mud in the corral?

(Testimony of Anthony Perine.)

A. Oh, I have fed them—I feed them in the bins and sometimes I put it along the edges.

Q. Along the edges of the ground?

A. Yes, sir.

Q. Have you ever fed them outside of the corral? A. No, sir.

Q. Mr. Perine, is there any portion of the Southern Pacific corrals in West Sacramento that have a roof or cover over them?

A. Yes, sir, there is a little.

Q. How much area would that be?

A. Oh, I couldn't say how much it covers. It is not very much.

Q. Have you got any estimate at all?

A. 30 or 40 feet.

Q. Could that area of 30 or 40 feet accommodate 57 horses and mules? A. I don't know.

Q. Pardon me? A. I don't know. [116]

Q. Well, have you ever had in excess of 50 horses and mules in that confined area that has a roof over it? A. No, not that I know of.

Q. Would you put those in that area yourself, 50 horses and mules?

Mr. Wulff: That calls for an opinion and conclusion of the witness.

The Court: Sustained.

Q. (By Mr. Robertson): Is that a regular roof covered over?

A. Well, I guess you'd call it a breaker, a shelter.

Q. You say it is 30 feet by 40 feet?

(Testimony of Anthony Perine.)

A. No, it is small. I would say it is about 30 or 40 feet long and maybe 12 or 14 feet wide at the most.

Q. Do you have any kind of a map or drawing of the corrals as of December 17, 1954, or prior to that date?

A. A map?

Q. A picture or drawing or plan of it.

A. In my possession, you mean?

Q. No, in the possession of your employer, if you know.

A. I don't quite get the question.

Q. Well, have you ever seen some blueprints of the corral, have you ever seen any pictures of the corral or artist's sketches or drawings?

Mr. Wulff: Counsel, I tried to find some and I couldn't find any. I think I know more about it than he does. He is [117] just a clerk, he doesn't have anything to do with the blueprints.

Mr. Robertson: He has only been in charge of the corral since 1941 or 1942.

Mr. Wulff: He hasn't been in charge of the corrals.

Mr. Robertson: That is what he said.

Mr. Wulff: No, he didn't say that.

Mr. Robertson: How about the witness to answer the question?

The Court: Well, wait a minute here.

Mr. Perine, have you ever seen any maps or drawings of the corrals and their surroundings out there in your work as an employee?

A. No, sir.

(Testimony of Anthony Perine.)

Q. Anybody ever tell you that any such plans or drawings existed?

A. Not that I know of.

Q. (By Mr. Robertson): Do you know how far it is from the corrals out to the freeway, Mr. Perine?

A. Well, if you walked over the tracks, oh, I would say a mile and a half to two miles.

Q. By tracks, you mean that spur track that goes to the—I guess that would be the south, wouldn't it? That spur track, is that the one you are talking about? Maybe I can clarify [118] that for you, Mr. Perine. I will show you this aerial photo, Plaintiff's Exhibit in evidence No. 6. Now, here is the bridge that goes into the main Capitol Avenue, I guess you call it, the Tower Bridge here (indicating). A. Yes.

Q. And here is the freeway, the eastbound lane; here is the westbound lane; here is the El Rancho Hotel here (indicating).

The Court: Are you giving this to test his credibility or do you just want the facts?

Mr. Robertson: I want the facts, your Honor.

The Court: Can't you go out there in an automobile and measure it, drive it and find out how far it is? When you get through with this fellow here, he will only be guessing, apparently.

Mr. Robertson: I want to ask him one particular point about this right-of-way.

The Court: All right, proceed.

Q. (By Mr. Robertson): Is this curved line

(Testimony of Anthony Perine.)

along here that runs to the south—these are your corrals here, do you understand that (indicating)?

A. Yes.

Q. Do you understand this photo? I mean the highway, the corrals, the roads and the bridge here?

A. Yes, sir.

Q. These are the S. P. main lines, is it. up here, on along [119] through here, here is your corrals.

A. Yes, sir.

Q. Now, is this a spur track here that goes out across the highway that you spoke about when I first questioned you?

A. Yes, sir.

Q. Is that spur track open so that if the animals get out of the corral they could walk right down that spur track and go across to the freeway?

A. Yes.

Q. There is nothing there to stop them from doing that?

A. No, there is nothing to stop them.

Mr. Wulff: Let's see what you are talking about.

Mr. Robertson: I said is this spur track from the corral the way——

Mr. Wulff: That isn't a spur track. That is the Port District main line track.

Mr. Robertson: Whatever it is.

Q. Is this Port District main line track open along here where the animals could come out of the corral and go right down that and cross the highway?

A. I think so, yes, sir.

Mr. Robertson: That is all, your Honor.

The Court: All this testimony makes it more and

(Testimony of Anthony Perine.)

more clear to me that what we need of this area is a map and then we won't have to be guessing and assuming and trying to figure out [120] what that photograph there means.

Mr. Robertson: Mr. Miller and I are going out and try to get a map tonight, your Honor. We called at noon, your Honor, and we are trying to make arrangements to do that.

Mr. Wulff: May I ask a couple of more questions, your Honor?

The Court: You can ask them, yes, but is it going to be a couple or are you going——

Mr. Wulff: I have three, your Honor.

The Court: Well, you better wait until after recess, because I know these "two questions."

(Recess.)

Recross-Examination

By Mr. Wulff:

Q. Can you tell us the Southern Pacific employee who was in charge of the Washington corrals, if you know? A. I think Mr. Fisher.

Q. Mr. Fisher, the Freight Agent?

A. Yes, sir.

Q. Now, you spoke about a cover being in the corral. Is this a cover straight through two corrals?

A. Yes, sir.

Q. Isn't it about 30 feet in each corral?

A. I wouldn't say on measurements. It extends in both corrals.

(Testimony of Anthony Perine.)

Q. On two corrals, covered? [121]

A. Yes.

Q. Now, you have observed Mr. Coons over a substantial period of time, have you not?

A. Yes.

Q. Can you state whether or not he is an experienced livestock man?

A. Yes, sir, he is a good one.

Mr. Wulff: That is all. Those are my three questions, your Honor.

Redirect Examination

By Mr. Robertson:

Q. Were the horses and mules that were unloaded from the train on December 16 put in the corrals that had covers over them?

A. No, sir, he had them in different corrals.

Q. What is that?

A. No, he had them in different corrals.

Mr. Robertson: That is all.

Recross-Examination

By Mr. Wulff:

Q. But he could have put them in that corral, could he not, if he wished to? A. Yes, sir.

Mr. Wulff: That is all.

If your Honor please, I was just served late yesterday afternoon with a demand and I am in position to state to the Court that there are certain things we haven't got and certain [122] things we

(Testimony of Anthony Perine.)

have got. Is this the proper time to present what they wish?

Mr. Miller: Mr. Wulff, we are running so short of time here, and I would like to get Mr. Houck, a highway patrolman, on this afternoon if at all possible.

Mr. Wulff: Very well. I am in a position to conform to everything we can possibly conform to.

Mr. Robertson: I don't think we will need those materials until tomorrow morning.

Mr. Wulff: We have them available.

Mr. Miller: Thank you.

Your Honor, may it please the Court, I am Mr. Miller. I would like to take over the questioning at this time of the highway patrolman who was at the scene of the accident.

The Court: As I told Mr. Wulff this morning, I am not going to tell you gentlemen how to run your case. Anybody that wants to can ask questions as long as they are admitted to practice before this bar.

Mr. Miller: Thank you, your Honor.

GEORGE HOUCK

called as a witness on behalf of the plaintiff; sworn.

Direct Examination

By Mr. Miller:

Q. Mr. Houck, will you state your residence, please?

A. I live in West Sacramento, 1938 Maryland Avenue. [123]

(Testimony of George Houck.)

Q. And what is your occupation, sir?

A. I am a highway patrolman, California Highway patrolman.

Q. And how long have you been a California highway patrolman?

A. Eight years, approximately.

Q. And are you assigned to the West Sacramento area?

A. Well, it would be Yolo County, is what it amounts to.

Q. And how long have you had that assignment, sir?

A. I have been there five years.

Q. And does that area include what is known as U.S. 40 or what is the West Sacramento Freeway?

A. That is correct.

Q. And what portion of the West Sacramento Freeway do you cover?

A. Well, all the way from the causeway into Sacramento.

Q. That is the Yolo Causeway into the City of Sacramento?

A. Well, I patrol the whole road clear to Davis, usually, when I have that beat, to Sacramento.

Q. On December 16, 1954, sir, can you state whether or not you were on duty?

A. I was.

Q. And what were your duty hours on that day?

A. When I started to work until 6:00 o'clock that night. I did work longer that night.

Q. And can you tell me, sir, whether it came to your attention during the course of that day that

(Testimony of George Houck.)

there were animals, horses [124] and mules on any area of the West Sacramento Freeway?

A. Yes. I received a call at approximately 5:30, I believe it was, informing me that there were horses on the freeway and the location where they were.

Q. And what did you do, sir?

A. I proceeded to that point.

Q. And what was that point?

A. Well, it was in the vicinity of what we call the Riske Overpass, Rieke Lane, U.S. 40, the Freeway.

Q. I have a photograph here and I ask you to examine it and tell whether or not the overpass here is the Riske Overpass?

A. That is correct.

Mr. Wulff: May I see it, counsel?

Mr. Miller: Yes, certainly.

Mr. Wulff: That doesn't show——

A. This is the Riske Overpass (indicating).

Mr. Wulff: This is another picture.

Q. (By Mr. Miller): You are familiar with that entire area, are you not, sir?

A. Well, in the immediate vicinity of the roads. The rest of it I know, but I am not as familiar with it as I am with the roads.

Q. All right. I have two photographs. I would like to get them marked for identification.

Your Honor, these are photographs of the adjoining areas [125] and if it is satisfactory to the Court, I would like to have them admitted as one exhibit, labelled——

(Testimony of George Houck.)

The Court: I don't like to have exhibits split up.

Mr. Miller: All right. I would like to have this first one——

The Court: You can have them marked in sequence.

Mr. Miller: I would like to have this one marked, I believe it is 11 for identification.

The Court: It will be 12.

Mr. Miller: 12 for identification.

The Court: Yes. The first will be 12 for identification and the second will be marked 13 for identification.

(The foregoing photographs referred to were marked Plaintiff's Exhibits Nos. 12 and 13 for identification.)

Mr. Wulff: If your Honor please, I am assuming that is only introduced for the purpose of showing where the Riske Overpass is located.

The Court: It isn't introduced yet, Mr. Wulff.

Mr. Miller: These photographs will be introduced, your Honor, for the purpose of showing the location of a section of the West Sacramento Freeway the location of streets leading into the West Sacramento Freeway, the location of a railroad bridge coming across the West Sacramento Freeway—I believe, that is the Port District railroad bridge—and I believe, [126] while vegetation in the area may have changed, the roadways and railroad lines are the same as at the time of the accident.

(Testimony of George Houck.)

The Court: What is there about these photographs that may be more helpful than a map?

Mr. Miller: Well, your Honor, the witness will testify as to where certain of the animals were corralled prior to the accident, and it also illustrates it——

The Court: Well, can't that be shown on a map? When I used to practice law—I am not lecturing anybody on this thing—the first thing I prepared when I had a case of this sort was a map. I don't think there is anything in the world that can beat a map. It shows where, when and how something happens. I venture that Mr. Houck will bear that out. I think the first thing his department requires him to do is to prepare a map of the scene of an accident. Is that right, Mr. Houck?

A. That is correct.

Mr. Miller: Well, your Honor, I believe——

The Court: In other words, I am not saying now that I want to call a halt. I am just urging you to get a map prepared in this matter here.

Mr. Miller: Well, your Honor, the map, the purpose for which I am introducing this, to show the location of the mules and the fact that the mules had access to the freeway, this shows the distances in the area. I don't believe that a map [127] would illustrate where fences are located and where fences are not located.

The Court: Well, the maps I used to have made when I was trying cases of this sort, showed where the fences were, where the power poles were, the

(Testimony of George Houck.)

guy wires were, where lights were, where sign boards were and where everything else in the area was of any particular consequence, and they were made to scale and were easily read by anyone who wanted to look at them.

However, as I say, go ahead. I am just suggesting to you what would be helpful to me, and I think probably you will want to help me before we get through.

All right.

Q. (By Mr. Miller): Mr. Houck, I believe you stated that you are familiar with the area surrounding the West Sacramento Freeway.

A. Yes, sir.

Q. And can you state, looking at Plaintiff's Exhibit 12 for identification, can you state whether or not the highway running across the photograph is a portion of the West Sacramento Freeway?

A. That is correct.

Q. And it shows a railroad track coming across that freeway and leading to the left side of the picture. Now, can you tell me what railroad track that is?

A. Well, I know it runs from [128] Broderick—

Mr. Wulff: I don't know whether they join the stipulate that this is the Port District track which connects the Southern Pacific Company, Sacramento Northern, with the track that leads to the Port warehouse and Port facilities.

(Testimony of George Houck.)

The Court: If Sacramento was a bigger place, is that what you would call the belt line?

Mr. Wulff: Belt line railroad.

Mr. Miller: Will you also stipulate, counsel, that this track passes in the area of the Southern Pacific corrals in Broderick?

Mr. Wulff: I don't know whether they join the S.P. property or not, but it is in the vicinity.

Mr. Miller: Yes. Well, we have in mind, your Honor. I would like to offer Exhibit 12—oh, we might as well cover 13 while we are at it. This purports to show the highway running across from left to right on the picture. Can you tell me whether this is the West Sacramento Freeway?

A. That is correct.

Q. And can you tell me the name of the overpass that traverses the freeway?

A. That is the Riske Lane Overpass.

Q. The Riske Lane Overpass?

A. That is the way I have referred to it in the past, but whether that is the actual name, I am not certain.

Mr. Miller: Well, all right. [129]

Now, with that in mind, your Honor, I would like to offer these two exhibits, Nos. 12 and 13, in evidence.

Mr. Wulff: With this one understanding: If there is something, if your Honor please, that wasn't there in December, 1954, we will be in the position to show it. I don't know, as far as I can

(Testimony of George Houck.)

see, they appear to be all right. They were taken over a year later.

The Court: When were they taken?

Mr. Miller: These pictures were taken yesterday, your Honor.

Q. I might ask you this: Were these landmarks that I pointed out, the freeway, the Riske Overpass and the road coming onto the freeway from Riske Overpass, the railroad bridge, were all of those objects existing at the time of this accident on December 17, 1954?

A. That is correct; they were. They were existing then.

The Court: Mr. Houck, there has been some reference to a railroad bridge. What bridge are you talking about there?

Mr. Miller: That is one of the overpasses over the freeway.

A. I don't know exactly what the number is or the name is.

Mr. Wulff: That is the same belt line, your Honor.

The Court: To me a railroad bridge is a bridge where a railroad goes across. That is what I am puzzled about. Is there a bridge that a railroad goes across, or is there an [130] underpass or subway or whatever you want to call it, or what is the situation?

A. What I understand is that it is an overpass over the freeway on which the trains travel.

The Court: In other words, the trains run over the freeway on——

(Testimony of George Houck.)

Mr. Wulff: That is right.

A. Run over an overpass over the freeway. The freeway is the roadway.

The Court: Yes, I understand that.

A. And the overpass is the train track.

The Court: It is Highway 40?

A. U. S. 40.

The Court: U. S. 40, from Davis to Sacramento.

Q. (By Mr. Miller): And, Mr. Houck, that railroad overpass to which you refer is shown at the right-hand side of Exhibit 12 for identification?

A. Yes.

Mr. Miller: With that, your Honor, I would like to offer these two photographs in evidence.

The Court: Let me see them.

(The photographs were handed to the Court.)

The Court: Where is this overpass, this railroad overpass, where is it with reference to the scene of the alleged accident?

Mr. Miller: The scene of the accident, your Honor, is at [131] the extreme left-hand side of the photograph.

The Court: Well, for what they are worth, they can be admitted in evidence as Plaintiff's Exhibits 12 and 13.

Mr. Miller: Thank you, your Honor.

(The photographs referred to were admitted in evidence as Plaintiff's Exhibits Nos. 12 and 13.)

(Testimony of George Houck.)

Q. (By Mr. Miller): Mr. Houck, following the receipt of information from your headquarters that mules were loose on the freeway or in the area of the freeway, what did you do?

A. I proceeded to the scene where the animals were last seen, which is approximately the Park Overpass.

Q. What did you find there?

A. Well, I found the deputy sheriff. The deputy sheriff had been attempting to corral them and he had them at this time behind a ditch right next to the Cal Central yard.

Q. Could you show me on Exhibit No. 13 the point at which the mules were corralled?

A. Do you want me to mark it?

Q. Yes. Will you mark it with an X?

(The witness marks on photograph.)

Mr. Miller: We will identify this——

Mr. Wulff: Put his initials opposite it.

Mr. Miller: Yes. I was going to mark it "H-1," if that is satisfactory to the Court and counsel.

The Court: Was this before or after the accident? [132] A. This was before.

The Court: Well, did they get out again?

A. Well, we don't know whether they got out or whether there were others in the vicinity. No one knows.

The Court: Well, that is what I am wondering. How does this evidence help me?

Mr. Miller: Your Honor, this shows the mules

(Testimony of George Houck.)

which were corralled in the area in which the accident occurred.

The Court: Well, there isn't the slightest doubt in my mind that there were some mules out on the highway there and that they were struck by the automobile here, by Mr. Grigg's automobile.

Mr. Wulff: That is correct, your Honor. Our defense is that they weren't S.P. mules.

The Court: Certainly somebody is going to have a difficult time convincing me that there weren't some mules out there that Mr. Grigg ran into.

Q. (By Mr. Miller): Mr. Houck, I will show you Plaintiff's Exhibit 2 which has been admitted to be a view from the Park Street Overpass looking toward Sacramento in an easterly direction. Do you recognize this as a view from Park Street Overpass?

A. It looks as though it is a view from the Park Street Overpass; I mean it is a part of the overpass, but it beyond the actual—— [133]

The Court: What number is that? Is that No. 2?

Mr. Miller: That is No. 2.

The Court: That, according to the information that I have here, was taken 50 yards east of the bridge.

Mr. Miller: Yes.

The Witness: That is what it looks like.

Mr. Miller: May we have No. 1?

The Court: Here is No. 1 laying up here. That is the one that has already got the marks on it.

Q. (By Mr. Miller): I will show you Plaintiff's

(Testimony of George Houck.)

Exhibit first in order. Do you recognize this as taken from the top of the Park Street Overpass?

A. That is possible. It looks as though it has been.

Q. Yes. Now, that, taken in conjunction with 2—2 is taken about 50 yards closer to Sacramento?

A. Yes.

Q. Now, after you had observed the animals which were corralled, as marked on Plaintiff's Exhibit 13, did you have the opportunity of observing any other mules in the area?

A. Yes, I did. I was at this position marked on map (indicating)——

Q. As H-1?

A. That is correct. I was on the shoulder of the road there, the north shoulder.

Q. And about what time of the day was [134] this?

A. It was somewhere around 6:00 o'clock.

Q. And what did you observe, sir?

A. Well, I looked west, it was, and silhouetted across the highway approximately, oh, four or five blocks down, I could see three mules or horses running across the highway.

Q. On which side of the highway was that?

A. That would be the eastbound lane; that would be the north side.

Q. And approximately what location on the eastbound lane did you see these mules and horses running across the highway?

(Testimony of George Houck.)

A. Well, they were on what would be a part of the drop-off on this Park Overpass.

Q. Can you indicate, sir, on Plaintiff's Exhibit 2 the approximate location of the horses and mules?

A. The perception is not quite clear. From where I was on the map there it would have been four or five blocks.

Q. Would it help to have the other photograph?

A. It would help. The perception is not quite what it would have been ordinarily.

Q. This is No. 5, which has been introduced, taken at a point 250 yards east of the Park Street Overpass.

The Court: I have got that down 200 yards.

Mr. Miller: 200 yards.

The Court: That is what I have got. Now, if I am wrong, I want to be corrected. Do you have that, Mr. Robertson? [135]

A. In other words, it was in this approximate vicinity.

Q. (By Mr. Miller): And in which direction were the mules running?

The Court: Wait a minute. Let's get this straightened out.

Mr. Robertson: What exhibit do you have?

The Court: No. 5.

Mr. Robertson: No. 5, camera at a point 250 yards east of the bridge.

The Court: I have got it wrong. I wanted to get that straightened out. 250 yards east.

(Testimony of George Houck.)

Mr. Robertson: 250 yards east of Bridge 22, facing west.

Mr. Wulff: Is Bridge 22 the same one he has been talking about as the Riske Overpass?

Mr. Miller: No, that is the Park Street Overpass.

Q. Is it your testimony, Mr. Houck, that this Plaintiff's Exhibit 5 represents the approximate area in which the mules and horses were located?

A. That is correct.

Q. And you state that they were running across the freeway at that point?

A. They were going south.

Q. And what did you do then, Mr. Houck?

A. Well, to get back to that location I had to go over the Riske Overpass back into West Sacramento and down to Park Overpass [136] and come in on the approaches there, and as I came in, I was below what had already occurred, an accident.

Q. And what did you see that had occurred?

A. I beg your pardon?

Q. What did you see that had occurred?

A. You mean from where I was or after I got up to the scene?

Q. After you got up to the scene?

A. Well, I saw a couple of dead horses and I saw one Cadillac that had the front end smashed in and another pick-up truck that was on the north shoulder that had sustained some damage.

Q. Did you see any other animals in the area other than the two dead mules?

(Testimony of George Houck.)

A. Yes. I was chasing them around there for the next hour or so.

Q. There were still other animals that were in and about that area?

A. There were quite a few.

Q. Now, what were the weather conditions at this time?

A. Well, the fog was beginning to set in. At that time it wasn't bad.

Q. What would say your visibility was? How far could you see at that time?

A. You could see quite a distance. As I say, the fog was floating in in spots. It wasn't solid.

Q. At the point where the accident occurred, would you say [137] the visibility was good?

A. Yes.

Q. Was it dark at that point? Was it necessary to use headlights?

A. Yes, it was dark at that time, very dark.

Q. Did you observe any skid mark from Mr. Grigg's car, the Cadillac?

A. I assume they were from the Cadillac. They led right up to it. They were approximately a hundred feet long.

Q. And what was the location of his car?

A. The front end was just over—over the bank, I suppose you would say, over the roadway there, and the back end of the car was on the roadway, in the east lane, it would be in the passing lane of the east lane, actually, facing north, actually.

Q. This car was facing almost north?

(Testimony of George Houck.)

A. Almost north.

Q. I will show you here where Mr. Griggs has drawn on Plaintiff's Exhibit 1 what he has considered to be the location of his car. Do you have any corrections to make to that?

A. Well, I would say it was just a little farther over the shoulder there, maybe three or four or five feet.

Q. But with the exception of that, is that a fair drawing of the location of the car?

A. That is substantially correct. [138]

Q. Did you have an opportunity to observe Mr. Grigg's condition at the time?

A. I did observe him. As I say, I was rather busy. What kind of condition?

Q. Well, his physical condition.

A. Well, he had been injured; that is, there was a cut on his hand that seemed to me rather severe, and that is all I can recollect.

Q. Did you have the opportunity to notice whether there was any damage to the windshield of the automobile?

A. Well, all I can testify to is the impression. The impression that is left in my mind was that it was damaged. The extent, I am not certain.

Q. Mr. Houck, coming off the top of that Park Street Overpass, can you tell me what the physical contours of land are at that point? In other words, what I am trying to get at is this: Is there a drop off on the left-hand side and the right-hand side of that roadway at that point?

(Testimony of George Houck.)

A. That is correct. It is built up a considerable distance above the Park Street road there below.

Q. And how deep is that drop there, would you say, sir?

A. Oh, approximately 20 to 30 feet. It depends on the exact point; where the accident occurred, as I say, I rode all the way down; it is at least 20 feet.

Q. Did you observe mules down in that gully there? [139]

A. Live ones?

Q. Yes.

A. There were live ones running around between the roadways.

Q. At that time?

A. At that time.

Q. From the physical surroundings of the accident, were you able to form an estimate as to Mr. Grigg's speed?

A. You mean my impression or opinion?

Q. Yes.

The Court: I don't want any impressions. In other words, if you are in a position to give us an opinion which you can back up in some fashion, why, you can answer the question yes or no, but——

A. Well, I can go on——

Mr. Wulff: May I have that question reread? It is a little bit difficult to hear once in a while. I don't comprehend the question.

(Question read.)

The Court: And then the witness said, "Impression?" in a querulous voice, and I responded to that by saying I didn't want any impression but if he

(Testimony of George Houck.)

formed an opinion with reasonable certainty, I would determine whether or not I would permit him to give that when I determine what that is based on.

Mr. Wulff: I would be interested in hearing the basis of any opinion before we have the opinion, your Honor. [140]

The Court: Naturally.

A. The basis of the opinion would be the extent of damages to the mules and the car.

Mr. Wulff: What is that?

A. The basis of the opinion would be the extent of damage to the mules and the extent of damage to the automobiles and the length of the skid marks. There was a skid mark left by the Cadillac that was involved in the collision with the mules, and the mules and the Cadillac both sustained damage, and from those I can approximate the speed.

The Court: The testimony is that the Cadillac was involved in a collision with two mules, not one, but two mules.

A. I don't know. There were two dead animals.

The Court: Well, that is where you get into trouble, you see, assuming something——

A. I see what you mean.

The Court: It would make a difference if you hit two mules than if you hit one mule.

A. Oh, yes, it would make a difference. I mean I couldn't actually determine what difference it would make; all I can do is approximate.

The Court: Well, proceed.

Mr. Wulff: May I ask one question? Have you

(Testimony of George Houck.)

had any scientific experience in this, or is it just from observation?

A. Just from observation, no scientific [141] training.

Mr. Wulff You have had no special training on that, just practical training——

A. That is right, eight years in highway patrol work——

The Court: Well, you had to go to school out here, too didn't you? A. Yes, that is correct.

The Court: And you have to go back for training from time to time? A. That is correct.

The Court: And as part of the training they teach you to analyze an accident after you see it?

A. Yes.

Mr. Wulff: Did you have any training in estimating speed from that source of information ?

A. Well, I have had eight years of estimating speed. You get pretty accurate at it.

Mr. Wulff: I will withdraw the objection.

Q. (By Mr. Miller): Based upon your experience in the items you observed at the scene of the accident, what would you say you would approximate Mr. Grigg's speed at?

A. I would say it would be anywhere from 40 to 50 miles an hour. I couldn't be any more specific. There was no citation involved, because of that opinion.

Q. Mr. Houck, in your opinion, what would you say was a safe and reasonable speed at the time of the accident for a car [142] traveling in the direc-

(Testimony of George Houck.)

tion Mr. Grigg was traveling, going in the lane Mr. Grigg was traveling in?

A. Well, assuming that he was a competent driver, clear up to 65 miles an hour.

Q. Mr. Houck, did you, at the time you started to get these mules off the freeway, have an opportunity to put out any flares or any signals to warn drivers of automobiles concerning the danger of the mules?

A. No, I did not.

Q. Had any flares been thrown out by any other persons?

A. I couldn't say for certain if there had been.

Q. Following the accident, the next day following the accident, did you have the opportunity to examine the corral of the Southern Pacific in Broderick?

A. I went over there and I looked at it. I didn't examine it any more than just a casual glance at the condition.

Q. And from your examination of the corral what was the condition of the corral you saw?

Mr. Wulff: I object to that, your Honor. There is no evidence that the horses even got out of the corral.

The Court: Sustained.

Mr. Wulff: They were outside.

The Court: That is not a matter that even a highway patrolman can pass an opinion on. He can describe what he saw.

Q. (By Mr. Miller): What did you see, [143] sir?

(Testimony of George Houck.)

A. All I can do is speak in general terms; I don't remember anything specific. I can remember the impression that I got when I looked at the corral.

The Court: Mr. Houck, just tell us what you saw there. If you didn't see anything, why, you say so, but if you saw something there, why, you tell me what it was and let me form the impression.

A. Well, I saw the corral. Could I state the condition I thought it was in?

The Court: No, not the condition you thought it was in; the condition you saw it in.

Q. (By Mr. Miller): The condition that you saw it to be in?

A. Well, that is quite a while ago. I don't remember just exactly the condition that it was, other than the impression that I got, which you say would be an opinion if I stated it. I did make out a citation on the strength of the impression, and that is all I went on.

Q. Mr. Houck, as near as you can recall, can you state exactly what you saw? I realize it is difficult to do, but as near as you can recollect can you state what you saw with reference to the corral?

A. Well, this might not have been a part of the corral, it was where the horses were at the time that I arrived. It seems to me there was wire around this fence and in spots there was—— [144]

Mr. Wulff: May I object to that, if the Court please; that is not the corral, that is not the property we are talking about.

The Court: He is describing where the horses

(Testimony of George Houck.)

were when he got there. I am going to let him describe it in the interests of saving time. If it isn't the corral, I am not going to pay any attention to it.

A. Well, I am not a cattle man—excuse me.

The Court: Go head, Mr. Houck.

A. I am not a cattle man. I really don't know the difference between a corral and a fence and a yard. However, they were enclosed, and part of this enclosure was of wire, and part of it there wasn't too many wires. Part of it, it seems to me, that the wires sagged somewhat. As far as wood corners of the fence, I don't really remember anything specific.

Q. (By Mr. Miller): Did you examine the gates, sir?

A. No, I did not examine the gates.

Q. You stated you noticed Mr. Grigg had a cut in his hand and was bleeding, I believe. Can you tell me what care was given Mr. Grigg at the scene of the accident?

A. It seems to me he had a bandage around it, but then I am not certain. As I say, I was busy.

Q. Did another highway patrolman come up about that time, sir?

A. Yes, I believe there was, that there was another highway patrolman came up there at that time. [145]

Q. What was his name? A. Bob Jean.

Q. To save time, sir, did Mr. Jean take Mr. Grigg to the Mercy Hospital?

A. I believe he did. I am not certain. I didn't see him go, is what I mean.

(Testimony of George Houck.)

Q. Is it your memory that he was taken to the hospital by him?

A. It is my memory that he did.

Q. Now, as I understand your testimony, Mr. Houck, you saw these mules, you saw mules running upon the Park Street Overpass prior to the time the accident occurred, and by the time you got there the accident had occurred?

A. That is correct.

Q. And as near as you can fix it, what was the time of the accident? A. It was around 6:00.

Q. Would it assist you, sir, to fix the time, to look at the report that you helped to make out for the highway patrol? A. Oh, certainly.

Q. I show you a vehicle accident report, California Highway Patrol, name of officer, G. Houck, date of report is December 17, 1954, on a Friday, involving an accident. Can you state from that whether by observing that it helps you to place the time of the accident? [146]

A. Yes, it was just after six o'clock, approximately 6:15.

Q. Were there any other automobiles at the scene of the accident involving Mr. Grigg?

A. There were quite a few other automobiles. The road was blocked.

Q. And were there any other automobiles that were involved in this particular accident?

A. There was another, a pick-up truck.

Q. And was that driven by a Mr. and Mrs. Spansel?

(Testimony of George Houck.)

A. I believe that is the name. I don't—

Q. Wasn't there a Buick which had been following Mr. Grigg that hit the rear end of Mr. Grigg's car, to your recollection?

A. There was a party that admitted running into Mr. Grigg's Cadillac.

Mr. Miller: Thank you very much, Mr. Houck.

Cross-Examination

By Mr. Wulff:

Q. Just a few questions, Mr. Houck. Now you testified, I believe, that you received a call at 5:30 that there were horses on the freeway?

A. I believe it was approximately 5:30.

Q. Now, did you find out how long they had been on the highway, on the freeway?

A. I heard from the deputy sheriff, he told me how long they had been on, or how long he had been chasing them.

Q. And you investigated that, did you, looked into it and [147] ascertained—

A. That wasn't a part of the accident; it wasn't a part of any of the citations I issued.

Q. Would you mind telling us how long he had been chasing them?

Mr. Miller: I believe that would be hearsay, your Honor. Object to it on that ground.

The Court: The objection is sustained.

Q. (By Mr. Wulff): Mr. Houck, you are familiar with the freeway. Are there any stretches of

(Testimony of George Houck.)

that road on the eastbound lane where a person could see ahead to the east 50 feet or less?

Mr. Miller: I object. It would be immaterial unless it deals with the scene of the accident.

Q. (By Mr. Wulff): All right. Let's say between the causeway and the N Street Bridge.

Mr. Miller: I still object. That doesn't deal specifically with the scene of the accident.

The Court: Mr. Wulff, if I understood your question correctly, it isn't going to be of any help to me at all. I don't think you meant what you said, or what you asked for.

Mr. Wulff: I think you are right. I will reframe it.

The Court: All right.

Q. (By Mr. Wulff): Are there any stretches of the freeway from the causeway, the eastern end of the causeway to the western edge of the bridge, N Street Bridge, on the eastbound [148] lanes where the view of a traveler going in an easterly direction is limited to 50 feet?

Mr. Miller: I still object on the ground, first of all, that it is not limited to night conditions which existed here, and it is not limited to the scene of the accident.

The Court: The objection will be overruled. The scene of the accident was within the purview of that question.

A. No, there would be no portion of the road there that would be limited to 50 feet.

Q. (By Mr. Wulff): Can you give us any idea,

(Testimony of George Houck.)

in daylight now first, the minimum view at any place on the highway as far as curves are concerned? A. You want the roadway?

Q. That is right, the view of a traveler in the eastbound lane and going east.

A. Well, there is a turn on the top of the overpass there, I never stopped to determine the distance there, actually; you can see quite a way over the overpass. Of course, that is assuming it is a clear day.

Q. Is there any portion of that eastbound lane on Exhibit No. 6, any portion of the eastbound lanes where the view is restricted by any curve?

A. Well, it is restricted somewhat.

Q. What do you mean by somewhat?

A. Well, this is a sweeping down here, and as you come up [149] you are coming up (indicating).

Mr. Miller: May the record show that the officer has indicated the Park Street Overpass on the exhibit.

Mr. Wulff: All right.

Q. Now, appreciating, and counsel will agree with me, I assume, that one inch on the map equals 300 feet on the ground, what would be the—do you agree with that?

Mr. Miller: 340 feet.

Q. (By Mr. Wulff): 340 feet to one inch. I stand corrected. Now, could you give us there the restriction of view with that in mind?

A. You have to bear in mind, too, that there is no perspective here. This road is built up 30 feet or

(Testimony of George Houck.)

so and you are coming up over a hill, a slight hill, as you come up Park Overpass. Of course, you can't determine the amount of the grade there.

Q. (By the Court): When you get up on top of the Park Overpass, how far down the road can you see from there?

A. Oh, when you are on top of it, you can see quite a distance.

Q. What do you mean by quite a distance?

A. Well, it would be clear down the road, as I recollect.

Q. Clear down to at least where it goes under the overpass that the railroad runs on?

A. That is if you are on top, yes.

Q. (By Mr. Wulff): Now, I understand that you could see the [150] horses and mules running down the highway to a certain point. How far distant were you from these horses and mules you saw running down the freeway?

A. As I say, it was between four and six blocks, or approximately a half mile, just estimating.

Q. Now, how long after that did the accident occur?

A. Well, it happened in between the time it took me to make the circle over Riske Pass down West Capitol Avenue to Park Boulevard, and then the approach from Park Boulevard onto the freeway.

Q. Give it in minutes, please.

A. Oh, possibly five minutes.

Q. In five minutes? A. Yes.

Q. Therefore five minutes from the accident you

(Testimony of George Houck.)

could see how many blocks, five or six blocks, or a half a mile, is that correct?

A. Oh, yes, that is correct. That is correct, from where I was.

Q. Now, from 5:30 on weren't there quite a number of people trying to corral these horses and herd them?

A. Not to my knowledge; I don't know—oh, you mean from 5:30, from the time I arrived?

Q. From the time you arrived.

A. There were not a group of people. I was the only one there [151] for, oh, 10 or 15 minutes.

Q. Wasn't the sheriff there before you?

A. He was.

Q. Did you see Mr. Coons there?

A. They came afterwards, that is what the sheriff left for.

Q. The sheriff was trying to herd them, was he not?

A. The sheriff had already herded them before I even arrived.

Q. He had collected them in a certain locale, had he not?

A. He collected a part of them. I mean, whether there were others out or not, I don't know. No one else knows, that I know of.

Q. And you made an attempt to herd them, did you not?

A. I just kept them where they were. They were behind this ditch and there were trees there at the time—it doesn't show on the map.

(Testimony of George Houck.)

Q. In other words, you were doing everything you could do to prevent them from going out on the freeway? A. Oh, naturally.

Q. There were flares put out, were there not, for some distance on the highway?

A. At what time?

Q. Prior to the accident.

A. There was one flare that was quite a distance from the scene of the accident and it was also quite a distance from [152] the roadway.

Q. Was that put out incident to the corralling of these horses?

A. It was put out to keep the horses in; it wasn't put out to warn people of danger.

Q. That was a part of the collecting or herding of the horses? A. I beg your pardon?

Q. That was a part of the collecting or herding of the horses?

A. Well, I figured this red flare would keep them back from coming out on the highway. That was the only way I had means of while I investigated the other end. I didn't know whether it was open back up on the highway or not.

Q. You testified you made a citation on the question of some wire on the enclosure. Now, I am obliged to ask——

A. No, you have me wrong there.

Mr. Miller: The officer said you are wrong. I think you are proceeding on the assumption that the officer——

(Testimony of George Houck.)

Q. (By Mr. Wulff): I understood you to say you issued a citation? A. That is correct.

Q. Now, against whom did you issue that citation? A. It was Mr. Coons.

Q. Who is he, sir?

A. He is a man that claimed he owned the horses.

Q. Was that citation served on Mr. Coons?

A. That is correct. [153]

The Court: Will you be very much longer, Mr. Wulff?

Mr. Wulff: I beg your pardon?

The Court: Will you be very much longer?

Mr. Wulff: No, just one question, I think.

Q. When you spoke of a wire enclosure, you didn't mean that fenced corral, did you?

A. No.

Q. I am pointing now to Plaintiff's Exhibit 9 for identification, if the Court please.

You saw a fenced corral, did you not?

A. Yes.

Q. You made no investigation of the condition of that, did you?

A. As I say, I looked at it, I looked at the whole vicinity, and from that impression—

Q. That isn't the wire thing that you are talking about? A. No.

Q. Was there a stampede of the horses prior to the accident, after you were there?

A. What do you mean by a stampede?

Q. Wasn't the idea of the red flare there put in

(Testimony of George Houck.)

there to prevent the stampeding of the horses, or did you think that caused stampeding of the horses? That is what I am trying to find out.

A. Oh, there is no question about it; it didn't; the horses wouldn't approach this entrance or opening——

Q. Did you notice any stampede of the horses, running wild around?

A. They were running around in back there where they were aroused, so to speak.

Q. Well, I think you testified, Officer, that you had corralled a large group of horses at a certain location.

A. The sheriff had.

Q. Now, did those horses break away?

A. That I couldn't say positively, because I left, and as I say, I took this circuit up around to the scene of the accident, and from that time those horses could have. I don't know.

Mr. Wulff: That is all.

The Court: Well, it is a certainty that those horses that you had in that corral were not the ones you saw running up the road a half a mile from there, isn't that correct?

A. There is no way of actually knowing that that I know of, your Honor.

Q. How could you have horses in a corral there and have them running up on the highway a half a mile west of there?

A. This ditch runs for quite a distance, and there are trees. We couldn't even see the horses most of the time, all you could see were their eyes

(Testimony of George Houck.)

shining through the trees. We were halfway in between that point. They could have run out through that break.

The Court: Well, I understood you were down there at the [155] corral when you saw these horses running up on the—or you had them corralled and had the red flare out when you saw them running up onto the highway.

A. The flare was down quite a distance. It was at the opening. We were down at the middle talking to Coons and the other sheriff who brought them back. We were deciding exactly what we would do.

Q. This is all before the accident happened?

A. That was all before the accident happened.

Q. Nobody put any flares out at that time, knowing that there were animals loose there on the highway?

A. Well, we had a squad car there. Usually if there is any danger, I always put the red light on in the rear.

Q. Well, did you have a flash going? You have a flash, don't you? A. I do.

Q. Did you have it going?

A. As I say, I usually do under those circumstances. I can't say positively if I did at this time.

Q. Well, the thing that is puzzling me is that there are animals running loose on the highway, isn't the first thing you would think of to throw down flares to slow down approaching traffic?

A. We didn't know whether there were other animals around or not. We did believe we had them all

(Testimony of George Houck.)

corralled. Whether [156] those were the same that ran across the highway at that time or not, I don't know.

Q. But you saw some running out there on the highway, and no flares were thrown down even then?

A. As I say, it took me some time to get down there. Actually the moment I would arrive there I would put out flares or anything else to make it safe. We thought we had them all corralled. That was a mistake in judgment.

Redirect Examination

By Mr. Robertson:

Q. Mr. Houck, the animals you talk about having corralled, that was not in a fenced corral?

A. No, definitely not.

Q. And that was east of the scene of the accident six blocks, is that correct?

A. Oh, at least.

Mr. Wulff: If your Honor please, I object to leading questions.

Mr. Robertson: Your Honor, there is no jury here. I think there is some confusion and I want to clear it up.

The Court: Why don't you let Mr. Miller do it? He is the one who is examining the witness here. Let him finish.

Mr. Robertson: All right.

Q. (By Mr. Miller): Mr. Houck, will you indi-

(Testimony of George Houck.)

cate on Plaintiff's Exhibit 13 the approximate point where the flare was placed. Mark it with an X and I will put "H-2."

A. Well, I can't tell exactly how far this runs, but it runs [157] a considerable distance, maybe three-quarters of a mile, and at that time, as I say, there were trees all along there. Where these horses were in that stretch, we don't know, I don't know. As I say, even one time I came around here to see if there was another opening in this end. It was clear down here (indicating) where the flare was. The flare would have been right in through here somewhere.

Q. All right. Indicate this with an X here? (Indicating.) A. That is approximately.

Q. And put "H-2," for the approximate location of the flare.

(Marking on exhibit.)

A. Yes.

Q. Now, sir, can you state whether the flare was on the easterly side of the point where Mr. Grigg collided with the mules?

A. Well, I can put it this way, that it was at a point where no one from the top of Park or beyond Park, west of Park, could have seen.

Q. Would Mr. Grigg have an opportunity to see that flare before the collision with the mules?

A. If he did it would be only a fleeting glance at the moment.

Q. Now, sir, on cross-examination there was

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GEORGE HOUCK

resumed the stand and testified further as follows:

Redirect Examination

(Resumed)

Mr. Miller: Your Honor, after court adjourned yesterday, Mr. Robertson and I went over to the Department of Public Works and obtained from them an official plan and profile of the area of the West Sacramento Freeway. I believe that Mr. Wulff will stipulate that this is an official map and a true and accurate representation of the area of the West Sacramento Freeway.

Mr. Wulff: It certainly appears to be. I just glanced at it.

Mr. Miller: Do you have any objection to admitting it, Mr. Wulff?

Mr. Wulff: It doesn't show where the corrals are situated. That is what I don't understand.

The Court: You can put them in on the map, can't you?

Mr. Miller: We have another map, your Honor, an official United States government map that shows the location of the corrals.

Mr. Wulff: I suggest the Court look at this and if this will serve your purpose I have no objection to it, your Honor.

The Court: Let that highway map be marked Plaintiff's [160] Exhibit 14.

(Testimony of George Houck.)

(The map referred to was marked Plaintiff's Exhibit No. 14 for identification.)

Q. (By Mr. Miller): Mr. Houck, I show you Plaintiff's Exhibit No. 14, which is a plan and profile of the State Highway in Yolo County, showing the Tower Bridge leading out to the Park Boulevard Overpass. Do you recognize this as a presentation of the routing of the highway in that area?

A. I do.

Q. And for the record I would like to mark first of all the approximate place where the accident occurred. Will you mark it with an X?

Mr. Wulff: Just a second. I think you better tell the witness how many feet on the ground is represented in inches on the map so he will have some idea.

Mr. Miller: All right. There is a scale right at the bottom of the map. There is a rule available?

The Court: Well, may I suggest something before you do that. In looking at that map I don't find any of the terms on there that have previously been used by Mr. Houck as describing the overpasses and underpasses. I think they'd better be marked and numbered so we can co-ordinate them on the map.

Mr. Miller: All right, your Honor.

Q. First of all, I would like you to indicate—I believe you [161] referred yesterday to a Riske Overpass? A. Yes.

Q. Do you find Riske Lane Overpass on this map? A. This is it.

Q. And in about the center of the map we have

(Testimony of George Houck.)

what is called the West Capitol Avenue Ramp Overcrossing. Is that what you mean by the Riske Lane Overpass? A. That is right.

Q. Now, will you make that with an X and I will place opposite it "Riske Overpass, and H-1" (marking on map).

Now, closer to Sacramento we have what is called the West Sacramento Underpass. I believe, if I am not mistaken, yesterday you referred to that as the railroad overpass, isn't that correct?

A. I believe that is the term I used. I am not sure.

Q. All right. We will call this "Railroad" and mark that "H-2" (marking on exhibit), and will you place an X at the location of that overpass?

A. (Witness marks on exhibit.)

Q. Now, we have discussed from time to time the Park Boulevard Overpass. Will you mark that with an X? A. (Witness marks on exhibit.)

Q. All right, we will write next to that "Park Boulevard Overpass" and put "H-3" there (marking on exhibit).

Now, will you indicate with an X the point where the [162] accident involving Mr. Grigg's car occurred.

A. Well, this is approximate, too. It is somewhere close to here (marking).

Q. We will mark that H-4 (marking on exhibit).

Now, sir, you spoke yesterday about having placed a flare out. Will you mark the point on the map where the flare was placed out?

(Testimony of George Houck.)

A. This is prior to the accident?

Q. Prior to the accident.

A. (Witness marks on exhibit.) It is approximately right there.

Q. All right. We will mark that H——

A. It would be on the other side of the ditch. You see, I put it right on the ditch. It is east of—or west of the ditch.

Q. All right, we will make another X and will draw a circle around the old X. We will mark this as “H-5” and write “Flare” beside it (marking on exhibit).

All right. Now, sir, can you point out the place on the map where the animals which had been herded together were located?

A. They were located right in back of this ditch, and there is a fence, Riske Lane—it is Cal Central, now, trucking company’s fence is right there, and they were in between the ditch and the fence. [163]

Q. All right, will you place an X to show the approximate location?

A. (Witness marks on exhibit.)

Q. I will mark this “H-6” and I will write beside it “Mules” (marking on exhibit).

All right, sir, you stated that while you were down near where the mules were located, the herd of mules, that you saw some mules going across the Park Boulevard Overpass.

Mr. Wulff: No, he said he saw some mules on the highway.

Q. (By Mr. Miller): On the highway. Now,

(Testimony of George Houck.)

can you show me approximately where you were when you saw these mules?

A. I would have been right here. I was on the north shoulder (indicating).

Q. All right, we will mark this "H-7" (marking on exhibit). And where were these mules at the time you saw them?

A. Well, approximately at the location of where the accident occurred.

Q. Approximately at H-4?

A. That is correct.

Q. All right, sir. Now, there was some talk yesterday about the mules being corralled at the location H-6. Now, I would like to clear that point up. Was there any corral built there?

A. There was not. There was only trees and the ditch itself and the fence on the north side that penned the animals up, so to speak. [164]

Q. And this was not the same location as the Broderick corral, was it, sir?

A. No, it was not.

Q. Now, the Broderick corral is not shown on this map, but can you show me in which direction the Broderick corral would be from the freeway?

A. It would be somewhere over in here (indicating).

Mr. Wulff: Do you know the street address?

A. No, I do not.

Q. You don't know whether it is on Fifth Street, Sixth Street, or what?

A. I know it isn't on Fifth Street. G Street, I believe, is the first one. It is around about four or

(Testimony of George Houck.)

five blocks and then it is west of there about three-quarters of a mile or so.

Q. (By Mr. Miller): All right. Now, will you place an arrow showing the approximate direction of the Broderick corral from the freeway?

A. This would be guessing (marking on exhibit).

Q. All right. I will write beside this, "Direction of Broderick corral," and I will write beside it "H-8" (marking on exhibit).

The Court: Well, he is referring to Broderick corral. That is a new term.

Mr. Miller: The S.P. corral, your Honor, is what we mean by that. [165]

The Court: Well, we were talking about the Washington yards yesterday, or something like that, and now we are talking about a Broderick corral this morning.

Mr. Miller: All right. I will also add "S.P. Broderick Corral."

Mr. Wulff: May I make a suggestion? In railroad parlance Washington Corral is the name they use.

Mr. Miller: Thank you. I think we ought to use that term for the corral.

The Court: Well, let's stick to the standard term. If that is the correct name of it, let's use "Washington Corral" all the way through.

Mr. Miller: All right. I will strike out "S.P. Broderick Corral" and write in "Washington Corral" (marking on exhibit).

Approximately how far—as nearly as you can

(Testimony of George Houck.)

guess, sir, approximately how far would you say the Broderick Corral is from the West Sacramento Freeway?

Mr. Wulff: Just before he answers that question: I know the address of the corral; that may help the officer there.

Mr. Miller: All right, will you give the officer that?

Mr. Wulff: It is Fifth and E.

A. Fifth and E?

Mr. Wulff: Yes.

A. I can't see how it could be on Fifth.

Mr. Wulff: That is the address, sir. [166]

A. If you will excuse me——

Mr. Miller: I have the address as 7th and E.

Mr. Wulff: I just asked the man in charge and he said it is Fifth and E.

A. I might say I have been out there, Mr. Wulff, and I understand the address to be 7th and E in Broderick, and that fits my observation.

The Court: I think we could save a whole lot of all this palaver here if we had a map showing where that corral is located. That is what I have been talking about for almost 24 hours. It is a cinch the corral doesn't move around from one day to the next.

Mr. Robertson: We have another map which will show the exact area of the corral.

The Court: All right then, let's not waste any more time on whether it is Fifth and E or 7th and E or X, Y or Z.

(Testimony of George Houck.)

Q. (By Mr. Miller): Now, have you driven along over the, let's say, the Park Boulevard Overpass at night, sir? A. I have.

Q. And can you tell me whether or not it is possible in conditions of darkness to see down into this draw at the point marked "H-4"?

A. Which side of the draw are you talking about there?

Q. Do your headlights light up the draw between the eastbound and westbound lane at that time? [167]

A. No, they do not. You mean approaching in a car?

Q. Yes.

A. No. You are going up a hill, so to speak, and it would be impossible for your lights to shine below.

Q. Approximately how far is it from the scene of the accident to the Washington Street Corral?

Mr. Wulff: Just a second, your Honor, I object to this—the witness doesn't know where it is and how can he tell how far away it is if he doesn't know where it is?

A. If you will pardon me, sir, I said I knew where the Broderick corral was.

The Court: We are not talking about any Broderick corral. We are talking about the Washington Corral.

A. The Washington Corral, I didn't say I knew where it was located.

(Testimony of George Houck.)

The Court: Well, if you can answer the question, answer it. I don't want any guesses, though.

A. As the crow flies it is approximately a mile. If you take the road, it is approximately a little longer.

Mr. Miller: Thank you, Mr. Houck.

The Court: Any questions, Mr. Wulff?

Mr. Wulff: Yes, just one. May we have that map, please?

Recross-Examination

By Mr. Wulff:

Q. From H-4, Officer, to point H-5, going down the easterly lane and going east, isn't that down a hill? [168]

A. That is correct.

Mr. Wulff: That is all.

Mr. Diepenbrock: I think you have got the wrong spot there. It should be H-3 to H-4.

Mr. Wulff: I beg your pardon, I guess you are right.

Q. Now, going from H-3 to H-4 on the same lane, is that down hill?

A. Where is H-3?

Q. Going east now.

A. Part of it is down hill.

Q. Isn't this the apex of the hill right there where the Parkway is?

A. That is correct, but it is level for a short distance beyond there.

Q. How many feet is it level?

A. I am not certain. I should imagine 50 to a hundred feet.

(Testimony of George Houck.)

Q. And then it is down hill?

A. That is correct.

Mr. Wulff: That is all.

Redirect Examination

By Mr. Miller:

Q. Is that a gentle or a steep slope?

A. It is a gentle slope, not abrupt.

Q. Now, one thing I should have cleared up before: Would you trace the path which you followed from the time you saw the mules up to point H-4 until you got there, how did you travel? [169] You left that point H-7?

A. That is correct. Took the cut-off and went over Riske Overpass, back to West Capitol Avenue, down West Capitol Avenue, what we called yesterday Park Boulevard; it is on here Jefferson Boulevard; and to the turn that takes you back onto U.S. 40.

Q. I think we should mark this point where you came back on U.S. 40. Will you make an X at the point where you came back on U.S. 40?

A. It was right at this point (marking).

Q. We will put this as "H-9" (marking on exhibit).

And where did you go from there? Did you go to point H-4 from point H-9? A. I did.

Q. And is that against the traffic?

A. That is going the wrong way on that section of the highway.

(Testimony of George Houck.)

Q. All right. May I ask you this, sir: When you got up to point H-4, could you see the flare that you put out on point H-5?

A. I didn't look for it, but I am quite certain you couldn't see it.

The Court: You would or wouldn't?

A. Could not.

Q. (By Mr. Miller): That flare was not on the highway, was it, sir?

A. It was not. It was 40 or 50 feet from the highway and in [170] the shrubs—not shrubs, but weeds at the time.

Mr. Miller: Thank you, Mr. Houck.

Recross-Examination

By Mr. Wulff:

Q. One question here on the map, I think you might establish one point. May I see the map temporarily? I believe you said—correct me if I am in error—you said you were standing at H-7, I think? Take a look and see if I have got that correct?

A. That is correct.

Q. Now, where was your car when you were standing at H-7? A. It was right there.

Q. Was that on the highway?

A. That is correct, it was on the shoulder.

Q. It was on the shoulder of the freeway?

A. On the shoulder of the freeway.

Q. And I assume when you stopped there you put your red blinker light on?

(Testimony of George Houck.)

A. As I say, it is my usual habit to put it on when there is danger impending.

Q. And parked along the shoulder it is a sufficient danger, is it not? A. Oh, no.

Q. You don't think so? A. No.

Q. How wide is the shoulder there? [171]

A. It is just a matter of policy. As a matter of fact, they suggest we don't use it any more.

Q. I am just concerned now in December, 1954. Will you tell us whether or not your best recollection is that the red blinker on the rear of your car was on? I assume you were facing east with your car?

A. I believe it was on, but as I say, I couldn't just come up and say it was on.

Q. In other words, it is your best recollection it was on?

Mr. Miller: I object——

A. It was my usual habit to put it on under those circumstances.

Mr. Wulff: The question has been answered, your Honor.

The Court: Overruled.

Redirect Examination

By Mr. Miller:

Q. In which direction would that red light be pointing in? A. It would be shining west.

Q. Now, sir, you are not positive as to whether it was on or off, are you?

(Testimony of George Houck.)

A. I am almost positive. I just can't come out and say it was on, period.

Q. You weren't there when this accident happened, were you? In other words, you had left part of the time this accident happened, had you not?

A. That is correct. I made the circuit during the time the [172] accident happened.

Q. So there was no car at that point and no red light blinking at the time the accident happened, was there?

A. When I got in the car, no accident had happened at that time, and I left immediately and it took me about ten seconds to get off the freeway.

Mr. Miller: All right, thank you very much.

Recross-Examination

By Mr. Wulff:

Q. Just a minute, please. When you arrived at the point of the accident, the accident had already occurred?

A. That is correct.

Q. You didn't see the accident occur, did you?

A. No, sir.

Q. Therefore you don't know when it occurred?

A. No, sir.

Mr. Wulff: That is all.

Mr. Miller: That is all, Mr. Houck. Thank you very much.

The Court: Just a moment, Mr. Houck. Mr. Houck, if I understood you correctly yesterday, you testified that at the time and place where this acci-

(Testimony of George Houck.)

dent occurred, it is your opinion that a speed of 65 miles an hour would not have been an unreasonable speed.

A. That was taking into consideration certain circumstances.

Q. Well, is that what you said yesterday?

A. No, sir. I added in there if the driver was competent [173] that 65 would have been reasonable.

Q. Then at the time and place of the accident, the driver being competent, 65 miles an hour, in your opinion, would not have been an unreasonable speed? A. That is correct.

Q. Now, what circumstances did you take into consideration in fixing that speed, Mr. Houck? Let us first talk about the road itself. What condition of the road did you assume at that time?

A. The road was dry at that time.

Q. Well, in arriving at your opinion, what condition of the road did you assume?

A. That it was dry, the roadway itself was in good condition; it is a freeway, we take that into consideration, two lanes going in the same direction.

Q. All right. Was it straight or curved at that point?

A. There is a slight curve, that is correct.

Q. You took that into consideration?

A. That is correct, sir.

Q. And did you, in arriving at your conclusion, conclude that in making that curve the lights might not be shining directly upon the highway?

(Testimony of George Houck.)

A. Yes.

Q. Incidentally, as you come east there on that, what direction is the curve, to the right or to the left? [174]

A. It is a sweeping turn to the left.

Q. A sweeping turn to the left?

A. That is right.

Q. Now, as you were coming around there where would that throw your lights of the automobile?

A. They would be mostly on the highway.

Q. Well, the part that was on the highway, would it be in the right-hand lane—I mean on the right-hand shoulder or the left-hand shoulder?

A. It would be on the right, of course. Of course, that isn't the fastest lane. There might be other automobiles obstructing that.

Q. All right. Now then, I understood you to say that there was an elevation there at what would be referred to as the Park Boulevard Overpass, and that that elevation is such that you can't see ahead of you on the road.

A. If I made that statement, I didn't mean it. You can't be—the distance isn't unlimited in making a turn like it is, when you are on a straight-away.

Q. What do you mean, that the distance isn't unlimited? Isn't that just another way of saying that you can't see the road ahead of you a part of the time there?

A. That is right, yes.

Q. Now——

A. What I am saying is that you can't see the

(Testimony of George Houck.)

complete distance [175] that you could on a straight-away, because the road does turn.

Q. As you come up over the overpass here, how much of the highway is obstructed to you as you are coming up that overpass?

A. The highway that is beyond you?

Q. Yes.

A. That is a little difficult to say. As I say, I have passed over it many times and the distance that you can see is a considerable distance.

Q. Well, let me ask you this: As you come over that overpass there, is there any part of the highway that is completely obstructed to your view? That is, if there was a pedestrian or a horse or an automobile ahead of you there, you couldn't see it?

A. It would be quite a distance there.

Q. That you couldn't see them? A. Yes.

Q. What do you mean by quite a distance?

A. Well, you have to take into consideration the complete rise in the roadway there that starts back about, I don't know, probably a half a mile to three-quarters of a mile, and from that distance you can't see over the top. You can see the roadway on the side, because it sweeps into where you can look, but as you actually approach the Park Overpass, [176] just immediately on the other side you couldn't see for a half a mile back, probably, maybe a quarter of a mile.

Q. In any event, there is a blind spot in the road as you come up over the Park Overpass?

(Testimony of George Houck.)

A. No, I wouldn't say there is a blind spot, your Honor.

Q. Then are you telling me that you can see the road all the way as you come up over the overpass?

A. In the daytime you have a very good view of most of the road at all times.

Q. I am not talking about most of the road. I want to know as you come up over the Park Overpass in broad daylight is there ever a time when you can't see the entire road ahead of you?

A. There is.

Q. All right. Then there is a blind spot in there, isn't there, a spot where you are blind as far as the highway is concerned?

A. Yes, putting it that way, that would be so.

Q. Well, now, that covers pretty much the highway. What was the condition as to whether or not it was light or dark at the time the accident happened?

A. It was dark.

Q. Will you tell us what does the California Vehicle Code say with reference to driving your car after dark, about how fast you should drive it?

A. I don't believe there is a thing in there that has reference to your speed in the night time that I know of. [177]

Q. Isn't there a section of the California Vehicle Code which says you must have your car under such control that you can stop within the distance that you can see in the beams of your lights?

A. I thought it was covered by Section 510 that

(Testimony of George Houck.)

says, "Reasonable and prudent," or something to that effect.

Q. But isn't there another section that says you must at all times drive so you can stop within the visibility that you can see at the time?

Mr. Robertson: Your Honor, I think that an examination of the laws of the State of California and the court decisions will show that there is no requirement that a driver of a car be able to stop in the distance of his headlights at night, and I can cite authorities on that point.

The Court: Well, do you mind if I examine the witness?

Mr. Robertson: I beg your pardon.

The Court: He made a statement yesterday and I want to get the basis for his statement on the matter.

Q. Is that your position then, that there is no requirement that you have your car in such control that you can stop within the visibility that is available to you? A. No, sir.

Q. You don't have to have your car in control to be able to stop in that distance?

A. You mean you don't have to have your car under control [178] within the distance of the lights?

Q. I didn't say that. Is it your position that you don't have to have your car under such control as to speed as to be able to stop within the visibility that is in front of you as you proceed down the

(Testimony of George Houck.)

highway? I am thinking of fog or night or anything else that obstructs your view.

A. I am still not quite clear on that, your Honor. Are you referring to the distance that you can see by the headlights?

Q. I don't care whether you can see by the headlights or what. If it were a foggy night and you couldn't see but ten feet in front of your car, would you say that it was safe to drive your car 65 miles an hour down the road? A. No, sir.

Q. Well, how fast could you drive under those circumstances?

A. Well, it would be a rather slow speed if you could only see ten feet in front of you. It would probably be better to get off the road.

Q. I am talking about ten feet in front of the bumper.

A. Yes. Well, if the fog was that bad, it is best to get off the road, there is no question about it. The danger is there regardless of what speed you are going. There is considerable danger.

Q. Well, then, let's come back to the original proposition. Did you take into consideration when you estimated the speed of 65 miles an hour that it was dark, in this case? [179] A. I did.

Q. Now then, how about a vehicle coming up over a rise where you can't see the road in front of you?

A. There is nothing in the Vehicle Code that I know of concerning a four-lane highway, two lanes going in the same direction.

(Testimony of George Houck.)

Q. Well, then, on that basis, do I understand it is your position that you can drive as fast as you want to if you come to a rise where you can't see ahead of you?

A. No, that would limit your speed, there is no question about that. But as I say, that is a long sweeping area.

Q. But you just told me that for at least a quarter of a mile before you come to the overpass there you can't see the highway.

A. That is correct, but a quarter of a mile is over a thousand feet.

Q. 1,320 feet, if you want to count them.

A. Which is a considerable distance to stop in at 65, or when there is no hazard there.

Q. Yes, but what would happen when you came over this rise here and there was an accident?

A. Oh, the roadway is revealed before you come within what would be a dangerous distance. At 65, sir, you can stop in 300 feet without any difficulty at all, especially in a brand new car with power brakes. [180]

Q. That isn't the point I am getting at. Where is the place that you can see everything down the road? Maybe I don't understand this thing. Where do you reach the place where you can see everything down the road that is ahead of you?

A. At the top.

Q. Right at the top. Well, let's back up on that. Suppose there is an accident 50 feet beyond the top?

(Testimony of George Houck.)

A. You could see it in plenty of time.

Q. In other words, you could stop in 50 feet?

A. No; oh, no. You would recognize the danger long before that.

Q. How would you recognize a danger if you can't see the road?

A. I said you could see the road for approximately a thousand feet back.

Q. I can't for the life of me understand what you are telling me. First you tell me that there is a quarter of a mile before you come to this overpass that the highway in front of you is blind.

A. No, I beg your pardon. A quarter of a mile back, a part of the highway would be obscured. As you proceed along this quarter of a mile, the rest of the roadway is revealed.

Q. Do I understand there is no obstruction at that overpass?

A. There is no obstruction. [181]

Q. You are telling me that from a quarter of a mile before the overpass you can see the entire highway?

A. No, that is where you can't see the entire highway.

Q. That is what I just said about two minutes ago, that there is a blind spot in that quarter of a mile there and you said no, you can see the highway.

A. Beyond me—at approximately a quarter of a mile back as you look down the highway over the peak, that would be obscured somewhat. As you proceed along this quarter of a mile, it is revealed.

(Testimony of George Houck.)

The vision continues with proceeding in the automobile.

Q. Well, in that quarter of a mile, 1320 feet, if you want to call it that, prior to the crest of the overpass there, you can see the full highway as you proceed down it, is that it? I am thinking about that eastbound lane and nothing else.

A. That is understandable, your Honor, but that is—that is getting down to fine points. As I say, I travel it quite often.

Q. Mr. Houck, it was you and not I that suggested that 65 miles an hour was a reasonable and prudent speed there, and it may of some very great importance in this case here, and I want to know why you fix that speed.

A. You want me to narrate my reasons?

Q. Yes, if you can give me your reasons why, I would like to know what they are. [182]

A. Well, at night time in a new car with power brakes, with excellent headlights and with a competent driver, on the freeway, when there is no rain or fog, and the fog at that time was not to the point where it had settled in over the freeway, under those conditions and over Park Boulevard Overpass there, even, 65 in my opinion is a reasonable speed, because no one expects someone to dart right out immediately in front of you, which is impossible to miss under any circumstances.

Q. Well, you say no one expects you to dart out there. Suppose there is an accident there on the highway there.

(Testimony of George Houck.)

A. By that time you would be prepared for it. You could see it.

Q. In other words, you can see the highway?

A. Yes, you can see—let me put it this way, your Honor, you can see enough of the highway to go along at 65 miles an hour and not produce any dangerous element.

Q. How rapidly do you anticipate that the average driver can stop his vehicle?

A. You mean going at 65?

Q. No, at any speed. What is the reaction time?

A. Oh, the reaction time, I understand, is a matter of three-quarters of a second.

Q. And at 65 miles an hour, using the rule of thumb, how fast does a vehicle travel? [183]

A. Those figures elude me, your Honor.

Q. It is one and a half times the speed plus three, isn't it? A. I don't know.

Q. In other words, if you are going 65 miles an hour down the road, it is 97 and a half feet plus three—it would be one hundred and a half feet per second?

A. Yes, plus the reaction time. It is still within three or four hundred feet. I mean, you can stop the whole procedure.

Q. What I am doing is just getting your reasons for—I take it that you have not considered that, not knowing those facts, you have not taken those into consideration.

A. I took those into consideration, your Honor.

(Testimony of George Houck.)

We are assuming that your stopping distance is approximately 400 feet under any kind of circumstances. That is the human element of reaction time, plus the fact that the automobile can't stop within more than a certain distance. That we will say at 65 is within 400 feet. But the visibility on the road is considerably more than 400 feet.

Q. Even out there in the dark it is more than 400 feet?

A. A car with adequate headlights.

Q. Now, getting back to what I wanted: If you are driving down that road there over that overpass, with adequate headlights, you could see down the road and see anything on it that was 400 feet ahead of you? [184]

A. Oh, yes, yes, that is my opinion.

Q. (By Mr. Miller): Can you state whether or not there are fences running alongside there of that freeway?

A. There are.

Q. And for what purpose have those fences been placed there?

A. To keep animals and people out, even.

Q. Ordinarily is there any animal traffic or human traffic across that freeway?

A. Ordinarily not.

Mr. Miller: Thank you, Mr. Houck.

Mr. Wulff: No questions.

Q. (By the Court): Those fences don't keep people and animals out of there, do they?

A. No, there are openings.

Q. Certainly. Then in other words, any indis-

(Testimony of George Houck.)

creet person or any dumb animal could get on that highway any time they wanted to, couldn't they?

A. Oh, yes.

Q. So you have got fences on two sides of a field and the other two ends are open, isn't that what the situation is?

A. Well, that is correct. They have to find the openings to get onto the freeway, and those openings are at a distance apart.

Q. Well, it is a field with two sides fenced and the other two ends are open? [185]

A. That is correct.

The Court: Anything else?

Mr. Miller: No, your Honor.

Mr. Wulff: No further questions.

The Court: That is all, Mr. Houck. Thank you.

Mr. Miller: May the officer be excused now, your Honor?

The Court: Unless there is objection, he may be excused.

Mr. Wulff: No objection.

Mr. Miller: Mr. Spansel, please.

MALVERNE P. SPANSEL

called as a witness on behalf of the plaintiff, Sworn:

Direct Examination

By Mr. Miller:

Q. Mr. Spansel, on December 17th of 1954, where did you live?

A. 5534 Alameda Avenue in Richmond.

(Testimony of Malverne P. Spansel.)

Q. And where do you live now?

A. Route 2, Box 415 F, Auburn.

Q. What is your occupation?

A. At the present time I am employed by the Yuba River Lumber Company as a contact man, outside salesman.

Q. And back in December 17th of 1954, sir, what was your occupation at that time?

A. I was retired from the Post Office Department.

Q. And how far back did you work for the Post Office Department?

A. Well, since 1930, 23 years. [186]

Q. Now, in December of 1954, you were, were you not, building a house for yourself up where you presently live?

A. That's right.

Q. And on that evening can you tell me where you were going?

A. I was going to the ranch.

Q. And from what point had you left?

A. Richmond.

Q. And at approximately what time did you leave Richmond?

A. As near as I can remember it was approximately a quarter after four when we left the Standard Service Station just east of Richmond.

Q. And, sir, during that period, you traveled quite frequently from Richmond to Auburn and Grass Valley, did you not?

A. Yes, sir. We made that trip every week end

(Testimony of Malverne P. Spansel.)

for—since about 1950, approximately three years, two and a half years.

Q. And what route did you travel?

A. I traveled 40 into Sacramento, that is to the west end of what we call the Tower Bridge, and then swung left and went through Broderick over the I Street Bridge, up Gibboom Street and straight through North Sacramento, or whichever route seemed to be the best at the time.

Q. And is it fair to say, sir, that is the route you followed on every trip you made?

A. Yes.

Q. And how frequently did you make these trips? [187]

A. Every week for approximately two years and a half, somewhere in that neighborhood.

Q. Can you tell me what your driving time was from Richmond to the Tower Bridge?

A. We checked it many times, from Richmond to the ranch is approximately three hours and a half.

Mr. Wulff: Just a moment. I object to what he was doing on other occasions except the occasion of this evening.

The Court: The objection will be sustained.

Q. (By Mr. Miller): Can you tell me how long it took you the evening of the 17th to drive from Richmond to the point where the accident occurred?

A. Approximately two hours.

Q. And from that approximately what time would you state the accident occurred?

(Testimony of Malverne P. Spansel.)

A. Shortly after 6:00 o'clock.

Q. Now, sir, were you traveling—from what you said it is fair to assume you had crossed the causeway and you were traveling over what is known as the West Sacramento Freeway?

A. Between the causeway and the bridge, yes.

Q. And that is the new freeway. What kind of an automobile were you driving?

A. 1950 three-quarter-ton Ford pickup.

Q. And can you tell me whether or not you had gassed up on leaving Richmond? [188]

A. I did.

Q. And had you had your windshield cleaned at that time? A. As always.

Q. And at the time you came onto the freeway was your windshield clean?

A. To the best of my knowledge.

Q. Who was with you in the pickup truck, if anyone? A. My wife.

Q. You had a dog with you, too, did you not?

A. Yes.

Q. Now, at the time that you were coming off of the Yolo Causeway, at what speed were you traveling?

A. 45. That is the speed limit on the causeway.

Q. Did you notice any other automobiles in particular about that time?

A. Shortly after we left the causeway, I should say, oh, within a couple of hundred feet, a Cadillac pulled up beside us. We were in the right lane, he was in the left lane, the passing lane.

(Testimony of Malverne P. Spansel.)

Q. This was a Cadillac of a later range, it was new?

A. Yes.

Q. And was it anything special that you noticed about this Cadillac?

A. Well, the fact that it was new and the fact that we couldn't afford one, and it passed us very slowly, so I speeded up to [189] keep it in the headlights because the wife was admiring it, and we traveled that way for, I don't know how far, some distance, and then I eased up a little bit and let it crawl away from us.

Q. Now, at the time you speeded up and held the same speed as the Cadillac, how fast were you traveling?

A. I picked up to approximately 50 miles an hour, I remember watching that, and as I held it at 50 miles an hour the Cadillac slowly drew away, very slowly.

Q. And what would you estimate the Cadillac's speed to be at that point?

Mr. Wulff: What point are you talking about?

Q. (By Mr. Miller): At the point the Cadillac begin to pull away from you. You said you slowed down——

A. Well, anywhere in the neighborhood of 5 miles an hour he was moving away from us, I would say.

Q. And how fast were you moving at that time?

A. 50 miles an hour, to the best of my recollection.

(Testimony of Malverne P. Spansel.)

Q. From that what would you estimate the speed of the Cadillac?

A. I would say in the neighborhood of 55. Not too much above 55.

Q. Now, sir, can you state what the visibility conditions were at that time?

A. The visibility conditions were good as far as weather was concerned. It was dark at that time in December. There [190] was no fog and we could see the headlights of the cars in the other lanes and down below, we could see the lights in the city ahead of us.

Q. All right, sir. Now, can you tell me what happened as you approached what has been called here the Park Boulevard Overpass? Are you familiar with that overpass?

A. Well, if you will pardon me for saying this, please, this overpass—I mean the discussion about this overpass confuses me somewhat. I personally from my point of view can see no bearing the overpass would have, because when we were involved with this business that occurred, we were past the overpass.

Q. You had just come up over the overpass?

A. We had come up over the overpass, yes.

Q. All right. Will you tell me what occurred then?

A. Well, as I say——

Q. First of all, where was Mr. Grigg's car in relation to your car?

A. He was in the left-hand lane.

Q. And how far away from you?

(Testimony of Malverne P. Spansel.)

A. Well, at the moment of his impact, I didn't know at the moment what had happened, but I could see that something had happened—from the moment of his impact to my stopping, considering the fact that I also struck an animal, I stopped with the cab at approximately a 45-degree angle to the rear of the Cadillac. So that is how far ahead of me he was. I wouldn't [191] care to estimate it in feet. Maybe 100 feet, 150 feet, somewhere along there.

Q. He was close enough so that you could see the Cadillac quite well?

A. Oh, yes. May I describe what I saw, what happened?

Q. Yes, please describe what you saw happen.

A. Well, as I stated, the road ahead of us was clear as far as I could tell, with the exception of this one car. All of a sudden his lights flew up in the air, as it were, and went out, and the car swerved with the rear end toward the center of the road. Immediately I expected—not knowing what had happened—that he would come into my lane, so I sat down on everything in front of me, and as I did an animal came out of the dark from the left on a dead run and I struck him, and as I came to rest, I was practically alongside of the Cadillac.

Q. Was that the first time you saw any animal?

A. That is the first time I saw any animal, and it was just that fleeting glimpse, because it was just on a dead run.

Q. He was running, you say?

A. Yes.

(Testimony of Malverne P. Spansel.)

Q. Now, can you describe to me the course of this animal?

A. Well, it looked as though it was a range animal, it was a dark brown, dirty color. The clearest thing I could see about the animal was his eye, he was looking over his shoulder. [192]

Q. Was there any reflection from his coat from your headlights? A. No.

Q. How would you describe his coat?

A. Well, sort of shaggy and dead in color, it was brown, a dark brown, but there didn't seem to be any reflection like you would get from a polished coat.

Q. In other words, there was no luster——

A. That is right.

Q. ——from the animal at all? A. No.

Q. How many did you see?

A. I saw only one, that is, clearly. There were others—how should I say it—I sensed them at the moment of impact, but it was the only one that I saw clearly.

Q. And what did you do after you came to a halt, sir?

A. I tried to close the doors of the cab, they had swung open in the impact, helped my wife up off the floor, asked her to get out as quickly as possible because there was following traffic and then I got out and looked at the damage to the front of the pickup.

I saw Mr. Grigg on the other side, but I didn't want to go out onto the middle of the road because

(Testimony of Malverne P. Spansel.)

we were blocking it and the traffic was coming up from behind.

My headlights were out, but my tail light was burning, so I knew I was safe there. [193]

So we got off to the side of the road to keep out of the way of traffic as much as possible.

In the meantime another car had come in behind the Cadillac on the left lane, and I have the impression that it bumped him slightly, but he was practically stopped.

It was shortly after that that Officer Houck arrived. This all happened in a very short space of time. It is a little difficult to sort out all the things that I could remember.

Q. Yes. Did you have an opportunity to observe Mr. Grigg's physical condition at that time?

A. To tell you the honest truth, I didn't pay too much attention to Mr. Grigg. I was more worried about us being in the path of the oncoming traffic.

Q. Mr. Grigg was later taken away, was he not?

A. That is what I understand. I don't know that.

Q. All right. You say Mr. Houck came up. About how long after the accident was it when he came up?

A. I would say he was there within five minutes.

Q. Within five minutes of the accident?

A. I would say it was within five minutes.

Q. Now, was anyone there who seemed to have anything to do with these animals?

A. Well, let's see; I don't remember at what

(Testimony of Malverne P. Spansel.)

time, as far as time relation is concerned, but the officer helped us or helped me push the pickup off the road onto the right-hand [194] shoulder so as not to obstruct the traffic, and it was quite cold and windy, and I got back in the cab and closed the door, held it shut, and some tall, slender man in jeans, and I think boots and a black hat, came up and was talking to various people around there. I don't remember that he spoke to me directly, but I think he speak to Officer Houck, and he seemed from what bits of conversation I could overhear to know something about it. Just what, I don't know.

Q. Sir, did you see any other mules in the area later? A. Later?

Q. Yes.

A. Well, to be able to point them out and count them, no, but ahead of us, and this was on a very gentle curve, as I remember, and the road falls away on both sides—that was another reason why it was impossible to miss the animals, and Mr. Grigg was in the left lane, there was a deep declivity on the right, I couldn't hit him and I couldn't go over the shoulder, so I couldn't miss the animal.

Q. You had no alternative?

A. I had no alternative but to go right straight ahead.

Q. Was there any change in Mr. Grigg's tail-light prior to the accident?

A. Oh, no, no. To my mind, the accident, or whatever he struck was the cause of it, because it

(Testimony of Malverne P. Spansel.)

happened now. And the car swerved sideways just as though it had struck something. [195]

Q. And what did you do when you saw a collision involve Mr. Grigg's car?

A. Well, I sat down with everything in front of me. I was afraid he might come into my lane and I wanted to be sure that I would stop in time, and I think I had the time, but immediately as I set the brakes, the other animal was in front of me, and that spoiled the whole thing.

Q. You were still unable to miss hitting the mule?

A. Yes, I couldn't miss him to save my life.

Mr. Miller: Thank you very much, sir.

Cross-Examination

By Mr. Wulff:

Q. Mr. Spansel, you have employed Mr. Charley Miller here to bring suit for you growing out of this particular accident?

A. No, sir, not I. I am not named.

Q. Have you not employed Mr. Miller? Do you understand my question?

A. Yes. I say I am not named. A suit is to be brought, but I am not named.

Q. In other words, you are not bringing it?

A. No, sir.

Q. But it grows out of something relative to your car? A. That is true.

Mr. Wulff: That is all.

Mr. Miller: Mrs. Spansel, will you take the stand, please. [196]

LILLIAN SPANSEL

called as a witness on behalf of the Plaintiff, Sworn:

The Court: Do you expect to prove anything different by Mrs. Spansel than you proved by Mr. Spansel?

Mr. Miller: She had an opportunity to observe some mules that were traveling around in the area after the accident, your Honor.

The Court: Well, what I was about to ask Mr. Wulff, would you stipulate that as far as Mr. Spansel's testimony is concerned, that Mrs. Spansel would testify substantially the same?

Mr. Wulff: Likely so.

Mr. Miller: All right.

The Court: Then will you confine your examination to these extra matters, if that is the stipulation?

Mr. Miller: If it is all right, your Honor, I would like to ask her if her testimony would be substantially the same.

The Court: Well, you could do that if you want to, yes.

Mr. Wulff: I have already stipulated to it. I don't know what it adds.

Mr. Miller: All right, then.

Q. Mrs. Spansel, following the accident, did you have an opportunity to observe any mules in the area? A. Yes, sir, I did.

Q. Will you please tell me what you did observe? [197]

(Testimony of Lillian Spansel.)

A. After the accident there were several rounded up, so to speak, by about, I think, three men, and they were trying to put them over behind the fence on the right-hand side of the road ahead of us just this side of what has been named the Port or Belt line.

Q. Let's see. I will get the map here and I think that might help us.

The Court: Was this after you had moved, Mrs. Spansel, or while you were still there at the scene?

A. We were still there at the scene waiting for some friends to come and pick us up.

Q. (By Mr. Miller): Mrs. Spansel, this is a Department of Public Works map showing the area. To orient you, I will point out that H-4 is the point that has been ascertained where the accident occurred.

A. And this is Sacramento (indicating).

Q. And this is Sacramento here. This at point H-2 here is the point where the railroad crosses the freeway? A. Yes.

Q. Now, can you show me on this map, can you indicate where you saw the mules being rounded up?

A. It seems to me it was right down in this area before you come to the—this is West Capitol Overpass (indicating)?

Q. Well, we called it the Riske Overpass in this trial.

A. Well, it was down in here (indicating). [198]

Q. At the point marked H-6, would you say?

A. Just about.

(Testimony of Lillian Spansel.)

Mr. Miller: All right. I will add that additional mark here on the map.

The Court: Well, if she indicates it is H-6, why, that is all you need.

Mr. Miller: Yes. It is the same area that Mr. Houck spoke of.

Q. Did you see any mules in the area between the two opposing lanes of traffic?

A. No, I can't say that I did.

Q. You saw the dead mules?

A. I saw the dead mules.

Q. You saw two of them? A. Yes, sir.

Q. On the left-hand side of the road?

A. Well, one was to the left of Mr. Grigg's car and one was out right straight out in front of us in the middle lane.

Q. All right. A. The white line.

Mr. Miller: Thank you. That is all.

Mr. Wulff: No questions.

Q. (By The Court): Mrs. Spansel, you were there at the scene of the accident and you say that you could see three men rounding up some animals down at what has been marked as H-6 [199] on this map?

A. When we were waiting for this friend of ours to come after us, we were walking around trying to regain our composure, myself and my dog.

Q. Well, did you walk up the road from there?

A. I walked down on the right-hand side of the road and back the same way to our truck, and kept walking back and forth.

(Testimony of Lillian Spansel.)

Q. How far down the road did you go?

A. Not too far, but you could see the people down there.

Q. Well, did you go the length of this room?

A. Farther than that. Twice, I would say.

Q. Twice the length of the room, and it was while you were walking there that you could see down there at this that is marked "West Capitol Avenue Ramp or Crossing" and that has been referred to by the officer as the Riske Overpass, and they were down to the right-hand side?

A. Down to the right-hand side and there was a little side street that came into the—the merging traffic came into Highway 40.

Q. Did you see a red flare down there at that time?

A. No, sir, I did not.

Q. How far beyond the Park Boulevard Overpass would you say it was where the accident happened?

A. That I couldn't say, not remembering where the overpass is.

The Court: That is all. [200]

Mr. Miller: Thank you very much.

Mr. Wulff: That is all.

Mr. Miller: I would like to call Mr. Courtney to the stand.

The Court: We will take the morning recess at this time.

(Recess.)

Mr. Miller: Mr. Courtney, will you take the stand, please?

DON COURTNEY

called as a witness on behalf of the Plaintiff, Sworn.

Direct Examination

By Mr. Miller:

Q. Where do you live, Mr. Courtney?

A. 700 F Street, Broderick.

Q. Will you please describe where your house is in relation to the Washington Corral?

A. Well, I own property right across the street from it, but I live down on F Street, and it is on E.

Q. You live about a block from the property?

A. Yes.

Q. And how long have you lived at 700 F Street in Broderick? A. Three years.

Q. And has the corral been there all that time?

A. Yes.

Q. You are acquainted with Mr. H. L. Coons, are you not, sir? A. Yes, sir.

Q. And can you tell me what business Mr. Coons was in? [201]

A. He was in the stock business, shipping stock from Texas and Arkansas out here to Sacramento.

Q. And, sir, what business are you in?

A. I am in the stock business. I have cattle and horses, also.

Q. And how long have you been in that business?

A. Ten years.

Q. Are you familiar with the habits and inclina-

(Testimony of Don Courtney.)

tions of horses and mules, the handling of horses and mules? A. Well, pretty well.

Q. Sir, can you tell me—I will put it this way; let's go back to December 16, of 1954, can you tell me whether or not Mr. Coons brought some horses and mules to the Washington Corral on that day?

A. Yes, he shipped two carloads in.

Q. And were you there at the time they were unloaded?

A. No, shortly afterwards. I saw them right after they were unloaded.

Q. And you saw Mr. Coons shortly after that?

A. Yes.

Q. And that was what time of day?

A. Oh, I imagine 10:30 or 11:00 o'clock, something like that.

Q. In the morning or evening?

A. That was in the morning.

Q. Where were the horses and mules at that time? [202]

A. In the S. P. stockyards.

Q. And can you tell me whether or not the gates were closed at that time?

A. Yes, they were.

Q. And how were the gates closed? In other words, how do you close those gates?

A. Well, they swing around with a latch.

Q. What kind of a latch?

A. It is a little latch to work with your finger.

Q. A sliding wooden board? A. Yes.

Q. Can you tell me whether or not, to the best

(Testimony of Don Courtney.)

of your recollection, there were any locks or chains upon those gates?

Mr. Wulff: If your Honor please, that is immaterial and incompetent. There is no evidence that the horses escaped from the corral and no obligation for the Southern Pacific Company to supply locks. The carloads had already arrived in Sacramento and he took over possession of the carloads.

The Court: In the interest of saving time, I am going to hear the evidence, but it will depend entirely upon who was responsible for the animals.

Mr. Miller: Your Honor, I was going to point out that there is an admission on file that the animals escaped from the corral, Plaintiff's Exhibit No. 11.

Q. Mr. Courtney, did Mr. Coons ask for the use of your pickup [203] truck on that day?

A. No, it was on a prior day.

Q. A prior day? A. Yes.

Q. Was this before the mules arrived?

A. No, the day after they arrived.

Q. And that would be the 17th?

A. Well——

Q. The same day as the accident?

A. Yes.

Q. And did Mr. Coons ask you for the use of your truck on that day?

A. He wanted to know if he could use my truck and if I would help him feed, and I helped him feed. I drove the truck myself.

(Testimony of Don Courtney.)

Q. You went to pick up a load of feed?

A. Yes—well, he had it all ready, right there by the S. P. corrals.

Q. And what kind of a truck did you have?

A. A GMC.

Q. You picked up some feed in the truck and took it to the corral?

A. No, outside the corral.

Q. You didn't take the feed to the corral itself?

A. No.

Q. You dumped it outside the corral? [204]

A. Yes.

Q. How far from the corral fences themselves?

A. Well, the nothern side of the corral was a part of the enclosure they were in, but they were on the outside of the S. P. stockyard in another little vacant lot they have there.

Q. Did you bring the animals outside to feed them then?

A. They were there when I fed them, yes. They were already let out.

Q. Why were the animals fed on the outside of the corral instead of inside?

Mr. Wulff: I object to that, if your Honor please——

The Court: Sustained.

Q. (By Mr. Miller): Can you tell me what the condition of the inside of the corral was at that time?

A. Well, they were a little muddy and it was handier to feed them outside.

(Testimony of Don Courtney.)

Q. How deep was the mud?

A. Oh, in the winter time I would say it varied from, oh, maybe eight inches to ten inches.

Q. Sir, from your experience, how many mules and horses were there outside this corral?

A. They were all of them. I would say 50 head or 55.

Q. And, sir, in your experience, is one man capable of controlling 50 or 60 horses and mules?

Mr. Wulff: If your Honor please, that calls for a conclusion [205] of the witness.

Mr. Miller: He is an expert, your Honor. He says he has handled them for ten years.

The Court: Well, I don't believe that is a subject for expert testimony. I will sustain the objection. There are too many ifs in the matter.

Q. (By Mr. Miller): Mr. Courtney, adjoining the place where these mules were being fed, is E Street in Broderick, is it not?

A. That is right.

Q. In other words, the open area in which they were being fed is right on E Street?

A. Between 7th and 8th on E.

Q. Between 7th and 8th on E. Now, is there any fence or enclosure between the area where the animals were being fed and the public street?

A. A very poor one.

Q. What?

A. It is a very poor one. They had from one to two wires stretched in the area.

(Testimony of Don Courtney.)

Q. A very poor fence. Would that fence prevent horses or mules from crossing it?

A. No, not if they wanted to get out. It wouldn't.

Q. There was no answer to a question which I asked to which the objection was overruled, and that question was—and this [206] refers to December 16th and 17th—was any lock on the corral?

A. Not that I recall.

Q. A chain and lock?

A. Not that I recall.

Q. Now, sir, where had you been on the day of the 17th?

A. Well, it would be kind of south of Auburn. I had cattle up there and I am sure I was up there feeding that day.

Q. On the day of the 17th did you return to Broderick?

A. It was shortly after dark just as I went to turn down onto 7th Street where I live, there was stock going across the highway.

Q. Horses and mules? A. Yes.

Q. Did you recognize them as Mr. Coons' stock?

A. No, not at the time. I drove up there because I thought maybe they might be mine, because I have a pasture, oh, about three blocks from there, but when I got up there, Mr. Coons was there with him and also a few of the other fellows putting them in, so I didn't even help him, because he had them right there and had enough help to put them in.

Q. They were putting them back into the corrals

(Testimony of Don Courtney.)

at that time? A. Yes.

Q. Sir, that area in which the corrals are located, can you state whether or not that area is frequented by children? [207]

A. Well, yes.

Mr. Wulff: I will object to that, your Honor. It is immaterial and incompetent.

The Court: Sustained.

Mr. Miller: Your Honor, what I want to show, the purpose of this question, is that these particular corrals can be opened by practically anyone, and the witness will testify that this area is more or less of a hang-out for children.

The Court: But the difficulty of your position is that you now have the animals outside of the corral. As I understand it, they are now out in a field where there is a two-wire fence between them and the fence.

Mr. Miller: Well, our position is this, your Honor: we have no eye witnesses who can state exactly how these horses and mules got off of the property of the Southern Pacific and onto the freeway. I think we have to establish it——

The Court: Now, wait a minute now, though, you have taken them out. I don't know who this wire fence the witness has just described belongs to, whether it is a Southern Pacific fence or whether it is somebody else's fence, and whether the gates were open, closed or what in the corral, if they are now taken out in a field where there is a wire fence between them and liberty, what difference does it

(Testimony of Don Courtney.)

make whether the gates were or were not open? This witness, your own witness, said that Mr. Coons had them out and had him help him feeding them [208] in the field there.

Mr. Miller: That was in the morning prior to the accident, your Honor. This particular witness was not there at the time the mules got loose, so he can't say whether the mules were back in the corral or whether they were out in the feeding area surrounded by this wire fence.

The Court: Well, there was some testimony on that, so I am not going to permit this testimony.

Q. (By Mr. Miller): Whose property is that corral located on?

Mr. Wulff: Just a moment. If the man knows. It is hearsay and inadmissible.

The Court: If he knows, he can answer it. If he doesn't know, he can say so.

A. I have always thought it was S.P. property. I could be wrong.

Mr. Wulff: I move to strike that out.

The Court: The answer may go out.

Q. (By Mr. Miller): Did you see those animals back in the corral at any time after you saw them in the morning?

A. No, I left shortly afterwards.

Q. Mr. Courtney, were you acquainted with Mr. Coons business? In other words, the exact manner in which he conducted his business of trading in horses and mules?

A. Not exactly. I knew him quite well and he

(Testimony of Don Courtney.)

used to buy horses and ship them in there, and I am a horse man myself and [209] we got acquainted.

Q. Do you know the procedure he followed in shipping them into Sacramento and shipping them out? A. He shipped several loads——

Mr. Wulff: Just a second. Unless he knows what happened on this occasion, if your Honor please, it would be incompetent and immaterial what he did before. The evidence is that sometimes he diverted them and sometimes he sold them here.

The Court: I know that is what the evidence is. If he knows, he can testify. He can't testify to what somebody told him.

Mr. Miller: Well, he was there——

The Court: Well, I am ruling in your favor now. You'd better leave well enough alone.

Mr. Miller: All right. No further questions.

The Court: You understand, I have ruled in your favor.

Mr. Miller: Oh, I am sorry, your Honor.

Q. Will you please state Mr. Coons' practices in regard to bringing mules in and shipping them out?

A. All I know, he shipped several loads in and would usually keep them a while and ship them out.

Q. How long would he keep them in the Washington Corral?

Mr. Wulff: I still think that is objectionable, what he did on prior occasions.

The Court: Well, you opened the question up

(Testimony of Don Courtney.)

yourself, Mr. [210] Wulff, by asking your witness Perine about the custom he followed.

Mr. Wulff: He wasn't my witness, your Honor, he was called by the plaintiff, and under 43 he is not a managing officer or director, so he is their witness, not mine.

The Court: Well, wait a minute——

Mr. Wulff: Subdivision (d) of Rule 43, your Honor.

The Court: Well, let's see what it says, Rule 43 is even more broad than Section 2055 of the Code of Civil Procedure.

Mr. Wulff: I have a copy here.

The Court: So do I.

“A party may interrogate any unwilling or hostile witness by leading questions, a party may call an adverse party or an officer, director, or managing agent of a public or private corporation or a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he were called as an adverse party, and the witness thus called may be contradicted or impeached by or on behalf of the adverse party, who may be cross-examined by the adverse party only upon the subject matter of the examination.”

Mr. Wulff: Now, he is not an officer, director or [211] managing agent of the Southern Pacific.

The Court: What do you call him, then?

Mr. Wulff: He didn't call him anything; he just called him.

(Testimony of Don Courtney.)

The Court: I know, but what do you call him? He testified that he was——

Mr. Wulff: He is an employee, one of 50,000 employees, and nothing else.

The Court: He testified he was in charge of a certain facet of their business. I have forgotten what it was.

Mr. Wulff: That isn't a managing agent.

The Court: Well, I rule that it is.

Mr. Wulff: I can furnish cases to the contrary, if the Court desires them.

Q. (By Mr. Miller): Mr. Courtney, will you please state for what period of time—first of all, over what period of time to your knowledge did Mr. Coons ship animals in and out of that Washington Corral? A. You mean how often?

Q. No. When did he first start shipping them in there, to your knowledge, how long ago?

A. Well, I would say a period of four years.

Q. Over a period of four years?

A. It could have been longer; I mean, I would say in the neighborhood of that. [212]

Q. And that is because you saw them shipped in there and you saw him with them?

A. That is right.

Q. And that is from your own personal observation, is it not? A. That is right.

Q. And how frequently would he bring animals into that corral?

The Court: I don't see, Mr. Miller, that this has any bearing upon the case.

(Testimony of Don Courtney.)

Mr. Miller: I would like to show, your Honor, that the mules that he would bring in would stay in the corral anywhere from three days to a week and then Mr. Coons would ship them out, usually on the S.P.

The Court: Well, ask him that, then.

Mr. Miller: All right.

Mr. Wulff: If your Honor please, there are records of all those things. I don't know why they are material. In other words, in his opening statement he stated that the shipment was sent from a place in Texas to Sacramento and arrived in Sacramento. Now, what he does after they arrived is entirely immaterial as far as the railroad is concerned. It is his property.

The Court: You may be correct on that, Mr. Wulff, but until I hear all the evidence, I can't make a decision on the matter. [213]

Q. (By Mr. Miller: Will you answer the question, Mr. Courtney? How long would Mr. Coons keep the animals in the corral?

A. He has kept them for a period of a week at a time, three or four days.

Q. Three or four days to a week, is that your testimony, sir? A. Yes, sir.

Q. And how would they be shipped out by Mr. Coons, or would they be taken out of the corral at the end of that period? A. By the S.P.

Q. By the S.P. Following their arrival in Sacramento on the evening of the 17th, did you have occasion to talk to Mr. Coons?

(Testimony of Don Courtney.)

A. Just when he was up there putting horses and mules in. I talked to him just a few minutes and I just turned around and went home, because I was late and I had been out all day.

Q. Will you please state the contents of that conversation?

Mr. Wulff: Objected to, if your Honor please, as hearsay.

The Court: The objection is sustained.

Mr. Miller: Your Honor, the point I wish to raise here is that we feel that in allowing Mr. Coons to go onto the S.P. property and perform a function of feeding and watering this livestock, which we maintain is a non-delegable function of the railroad, that the railroad constituted Mr. Coons as their agent, and that statements made within the scope——

The Court: Stop right there, Mr. Miller. Nobody can prove [214] their agency by their own extra-judicial statement. You have got to establish the agency by someone who knows other than the extra-judicial statement of the purported agent. Everybody could run around and say, "I am the agent of Mr. Miller," and bind you over at the bank on notes and other things.

Mr. Miller: Your Honor, there has been testimony that Mr. Coons requested permission of the S.P. to feed these livestock, and as a matter of law I think the Court can rule that it is the duty of the Southern Pacific when they are holding these ani-

(Testimony of Don Courtney.)

imals in the course of shipment to feed and water them.

The Court: The trouble is, you haven't shown that.

Mr. Wulff: The statute is to the contrary, your Honor.

The Court: Well, the facts are to the contrary at the present time.

Mr. Miller: The offer of proof would be that Mr. Coons stated that he put them back in the corral. The offer of proof would also be that Mr. Coons stated that the animals must have escaped from the corral, or some children must have let them out.

No further questions, Mr. Courtney.

Mr. Wulff: Mister——

The Court: Now, wait a minute. I assume your objection is going to stand in view of the offer of proof, Mr. Wulff?

Mr. Wulff: Oh, very definitely. [215]

The Court: All right. The objection will be sustained so that you will have a record.

All right, now you may proceed.

Cross-Examination

By Mr. Wulff:

Q. Mr. Courtney, when you left at 10:00 o'clock in the morning, all of the horses were outside the corral, were they not? A. That is right.

(Testimony of Don Courtney.)

Q. When you returned—what time did you return?

A. I would say shortly after 6:00. It was dark.

Q. Slightly after 6:00. At that time the horses were all out of the corral, were they not?

A. They were just across the highway, on—well, it would be just about 8th and E.

Q. They were just putting them in the corral? When you say “the corral,” you mean the wooden ones? A. That is right.

The Court: Excuse me, Mr. Wulff. I think we ought to clear that matter up now. We use the term “corral,” and I might as well say that to me a corral means a wooden or otherwise tightly enclosed area as distinguished from a fence around the particular area. Now, unless somebody has a different understanding of what a corral means, I wish you would refer to the corral as that wooden fence that appears in one of these photographs here, and this other area which I [216] understood Mr. Courtney to testify to a moment ago which had some two wires around it outside, as a fence around a field or area, or whatever you want to call it.

Mr. Wulff: I used the word “corral” solely for the purpose—

The Court: Well, I wasn’t criticizing. I just wanted to be sure that we didn’t have any misunderstanding about the matter.

Q. (By Mr. Wulff): You understand when we refer to corral that is that wooden corral—(exhibiting document to witness)?

(Testimony of Don Courtney.)

Mr. Robertson: I object, your Honor. We were not allowed to use these pictures. I don't see how Mr. Wulff can use them.

Mr. Wulff: They are in for identification.

Mr. Robertson: They are in for identification only.

The Court: I don't know that because you can't do something, Mr. Wulff can't do something to protect his side of the case.

Mr. Wulff: May I refer to them, your Honor?

The Court: You may refer to them.

Mr. Wulff: Referring to Plaintiff's Exhibit——

The Court: I don't mean by that that there is going to be one set of rules for you and one set of rules for him, but there are certain things that might be objectionable to you that certainly wouldn't be objectionable to Mr. Wulff. I have already indicated that there are certain things that you have done that Mr. Wulff did not like that I disagree with [217] him on.

Mr. Wulff: I heard that, too.

Q. Referring to Plaintiff's Exhibits 9 and 10 for identification, I will ask you whether or not you are familiar with the wooden corral which is depicted in this picture, which picture was taken recently, within a week, I would say.

Mr. Robertson: These pictures were not taken within a week. These pictures were taken last September.

Q. (By Mr. Wulff): All right, taken last September, '55.

(Testimony of Don Courtney.)

A. That is a picture of the corral, all right.

Q. You are familiar with those corrals?

A. That is right.

Q. And do you know what condition they were in on December 17, as far as being capable of holding horses?

A. They would always hold livestock, yes.

Q. Were they in good condition? A. Yes.

Q. Now, then, the wire fence you speak about, two wires, was that designed to hold horses?

A. No. I mean, it wouldn't hold——

Mr. Robertson: That calls for an opinion and conclusion of the witness, your Honor, and I object to it.

Q. (By Mr. Wulff): You saw it, did you not?

The Court: Well, I am going to sustain the objection. Describe what was there and I will determine. [218]

Mr. Wulff: I think he has already described it.

Q. Now, did Mr. Coons have some help there?

A. Yes, he had one that helped him quite recently there.

Q. Do you know his name?

A. I think his name is Funk. Everybody called him Tex, is what he is known by.

Q. Did you see him there on the 17th?

A. Yes, he helped feed, he and Mr. Coons.

Q. And did you see him when you got back?

A. Yes.

Q. Now, you spoke about the corrals being muddy. Now, did you notice whether there was any

(Testimony of Don Courtney.)

difference between the eastern and the western corrals?

A. Well, the western corrals, there were two of them that had the little shed over them which protected a little, all right.

Q. Isn't it a fact that the western corrals were drier than the ones on the east?

A. They usually are, yes.

Q. And you know that the horses were kept in there on the 16th? A. Yes.

Q. And you saw them put in there on the night of the 17th? A. Yes.

Q. Now, do you know whether or not there are any feeding [219] racks or bins in there?

A. Oh, yes. All the corrals had feeding racks in them.

Q. And the racks were not muddy, were they?

A. Well, no, in the winter time any corral is muddy when there is livestock in them.

Q. In other words, these corrals are no different from any other corral in the winter time?

A. That is right.

Mr. Wulff: That is all.

Redirect Examination

By Mr. Miller:

Q. Do you know where Mr. Coons is at the present time? A. No, I don't.

Q. How long has it been since you have seen him?

(Testimony of Don Courtney.)

A. Oh, I would say offhanded five months to six months.

Q. Do you know where he went to at that time?

A. No, I don't. All I know is he said he was going back to Arkansas or Arizona, somewhere around in there.

Q. Mr. Courtney, you spoke about a wire fence. Now, can you show me on this Plaintiff's 9 for identification—you state this was a picture of the corral area—can you show me on that where the wire fence is located?

A. No, it isn't on this picture. It would be further west.

Q. Is the fence still there? A. No. [220]

Q. It has been taken out?

A. As far as I know there is no fence there now.

Q. There is no wire fence on the outside of the wooden corral at the present time? A. No.

Mr. Miller: Thank you, Mr. Courtney.

Mr. Wulff: That is all.

Q. (By The Court): Mr. Courtney, will you describe that fence for me, please?

A. Well, gee. I don't know who made. It is just a little old——

Q. I don't care who made it. Just tell me—first tell me are they all the way around an area or are they just simply run along a couple of sides?

A. No, they stretch—I mean, Mr. Coons and Tex stretched one extra wire across the—I would say

(Testimony of Don Courtney.)

the length of this room, just to hold stock in there if they were watched. But a legal fence is a three-wire fence.

Q. Was there some wire all the way around the area where the stock was? A. Yes.

Q. All right. Now, I gather there were two wires in some places and only one wire in other places?

A. Yes.

Q. Let's start on the north side. What was along the north [221] side?

A. The S.P. Corral.

Q. The S.P. corral. That is this wooden corral made out of old ties, I gather, probably two by sixes? A. Two by eights.

Q. Two by eights they look like in that picture there. All right. Now, what was on the east side?

A. It also takes in a little part of the stock-yards.

Q. Was there some fence there, though?

A. Well, it comes out, the way it comes out, it was from the east veering west a little bit.

Q. All right. What was along on the south side?

A. Two-wire fence.

Q. Two wires, barbed wire?

A. Barbed wire.

Q. How frequently was it posted?

A. I would say 20 feet apart.

Q. Was the wire stretched taut, or just loose?

A. It was loose.

Q. Now, then what was along the south side?

(Testimony of Don Courtney.)

A. For a ways there is two wires and then the last portion one wire.

Q. How big was this area? Let's start again on the north side. How long is that north side of that area? Just roughly.

A. I would say 20 feet. [222]

Q. How long on the east side?

A. It would be 150 feet.

Q. How long on the south side?

A. Just about the same as the north side; in other words, about 200 feet.

Q. It was a rectangle then, there wasn't any angle on it? A. No.

Q. (By Mr. Miller): Along the south side, how long was the two-wire fence and how long was the one-wire fence?

A. It would be in the neighborhood of maybe 300 feet.

The Court: Maybe I didn't get that straight. I thought you said it was about 20 feet along the north side.

A. Oh, no. 200 feet.

The Court: 200?

A. That is right.

The Court: I am sorry. And then on the south side, it would also be 200 feet?

A. Pretty well. It tapers in. It doesn't run straight.

The Court: And how much of that was two wires and how much was one wire?

(Testimony of Don Courtney.)

A. I would say two-thirds would be two-wire and one-third one-wire.

Q. And you don't know of your own knowledge who erected that fence or put it in?

A. No; I don't [223]

Q. One other thing, there was some talk about feeding bins or—it doesn't make any difference whether you call it a manger or bin or box or what, do you know, of your own knowledge whether there is some feeding area in each one of the corrals there? A. Yes.

Q. And there was mud there. You mean by that that they were in the mud or do you mean that the animals would have to stand in the mud to eat the fodder or whatever is there?

A. No; they would have to stand in the mud to eat is all.

Q. The fodder wasn't in the mud?

A. No.

The Court: That is all.

Mr. Wulff: Mr. Courtney——

Mr. Miller: Your Honor, may I examine Mr. Courtney prior to Mr. Wulff?

The Court: Yes.

Q. (By Mr. Miller): Mr. Courtney, how long had that wire fence been there?

A. I really can't say, a few horse traders, they call them, used to pull in there, and who put it up or how long has it been there, I don't know.

Q. I am not asking who put it up, I am asking

(Testimony of Don Courtney.)

within your recollection how long that wire fence has been there.

A. I would say five years. [224]

Q. Five years. Mr. Coons didn't put that in, did he? A. Just patched it up is all.

Q. Now, have you ever seen animals fed in there other than Mr. Coons feeding animals within that wire fence enclosure? A. No.

Q. Do you know when that fence was taken down? A. No; I don't.

Q. Do you know who took it down?

A. No; I don't.

Mr. Miller: That is all.

Recross-Examination

By Mr. Wulff:

Q. Just one question here. You didn't see Mr. Coons take out any shipment that came in, did you?

A. No.

Q. Did you ever see Mr. Coons take some horses out by truck?

A. Yes; he has hauled out a few in trucks.

Q. That he sold locally? A. That is right.

Q. And these were what you call chicken horses, were they not?

A. I imagine that is what they are; we call them chicken horses.

Q. They are sold for chicken feed?

A. In Santa Rosa.

Q. And elsewhere, Petaluma?

(Testimony of Don Courtney.)

A. Well, I think it would be Santa Rosa. They say Petaluma, but I mean that would mean Santa Rosa. [225]

Q. But you have seen some shipments come in and he haul them out by truck, Coons?

A. Well, he has hauled a few out of there that he figured was too weak to truck—I mean to put in the S.P. yard one or two times.

Q. Are you familiar with any sales he made in Sacramento?

A. Well, I traded and got a few from him. He just exchanged.

Mr. Wulff: That is all.

Mr. Miller: That is all.

Q. (By Mr. Wulff): Just a minute. Didn't you testify to the Court's questions that Mr. Coons just stretched one wire in a small part of the area?

A. That is right. I would say about one-third of it.

Q. One-third of it. He himself?

A. Yes; just to hold them in.

Q. And two-thirds of it he didn't?

A. That is right.

Q. I mean, two-thirds of it he didn't patch?

A. Yes; I would say yes.

Redirect Examination

By Mr. Miller:

Q. But that fence had been there five years prior to this accident?

A. As far as I know.

(Testimony of Don Courtney.)

Recross-Examination

By Mr. Wulff:

Q. Was the one-third one wire strand there for [226] five years, too?

A. Well, no; it was down; he just patched it up to hold the stock in there.

Q. That is the part Mr. Coons did?

A. Yes.

Mr. Wulff: That is all.

Mr. Miller: That is all, Mr. Courtney.

Your Honor, may the witness be excused?

The Court: Unless there is objection he may be excused.

Mr. Wulff: No objection.

Mr. Robertson: Call Mr. Fisher, your Honor.

Mr. Wulff: This might be a good time, your Honor please. We were served with a notice to produce here and I am in a position to do that now. I assume he may want to do something with it.

The first one, you asked for conditional livestock agreement, shipment of mules and horses from Texas to Sacramento, California.

Now, those were shipped by the Texas Pacific Railroad Company and I am informed that there is only one original the shipper has that, but there is a carbon copy which is retained by the Texas Pacific Railroad Company.

Now, I procured that from the Pacific Texas Railroad Company and I am producing it pursuant to

this demand. It wasn't in our possession, but I have what they forwarded to me [227] as being a carbon copy, showing the signatures, et cetera.

Mr. Robertson: The pencilled notations——

Mr. Wulff: I don't know whose those are.

Mr. Robertson: Were they on when the document arrived?

Mr. Wulff: They were on when I received it.

Mr. Robertson: You don't know who put them on?

Mr. Wulff: No; I don't.

Mr. Robertson: As far as you know, this is a duplicate original?

Mr. Wulff: This is a carbon copy. That is the way I expressed it.

Mr. Robertson: All right. Now, the next document——

Mr. Wulff: The next document is the original diversion report.

If your Honor please, these are original documents here. I have photostatic copies which I will give counsel with it so it may be substituted.

The Court: Very well.

Mr. Wulff: Now, number three. There is no receipt for any shipment at all——

Mr. Robertson: Number three requested——

Mr. Wulff: There is no such thing.

Mr. Robertson: ——“Any and all documents in possession of Southern Pacific Company pertaining to receipt of said animals at Sacramento.” [228]

Mr. Wulff: There is no receipt obtained for any

kind of shipment, whether it is animals or what it is.

Mr. Robertson: Do I understand then there was no receipt signed by Mr. Coons to the Southern Pacific receipting for the delivery of these animals to Mr. Coons?

Mr. Wulff: No; there is no animal receipt given. We have the waybill——

Mr. Robertson: Can we frame that in a stipulation for the record, that when the animals arrived in Sacramento on December 16th, neither on that day or any other day was any written receipt signed by Mr. Coons and delivered to the Southern Pacific receipting for delivery of these animals?

Mr. Wulff: The only thing that the railroad gets, as I understand, they get a receipt for the money, for the payment of the freight. That is the only receipt for the shipment in any form. There is no such thing as a receipt for delivery. Receipt for payment only.

The Court: How would the company get a receipt for the money paid for the freight?

Mr. Wulff: There is a form of receipt for that?

The Court: Well, didn't Mr. Coons pay the money?

Mr. Wulff: He pays the money; yes.

The Court: Well, the company issues a receipt then, not Mr. Coons.

Mr. Wulff: That is right. The company gives a receipt that [229] Coons signed and the company keeps it, but the form of the receipt is on the waybill.

Mr. Robertson: I am speaking of a different matter, your Honor. I am speaking of where the consignee receipts for the goods delivered to him.

Mr. Wulff: There is no receipt for any kind of shipment. The railroad does not follow that practice.

Mr. Robertson: Do I understand the railroad company delivers goods worth a lot of money without getting any receipt from the consignee for the delivery of the goods?

Mr. Wulff: They get a receipt for the freight, that is all the receipt they get.

Mr. Robertson: That is what I am asking for, a receipt——

Mr. Wulff: For the freight bill, money, not for the goods.

Mr. Robertson: How can the railroad get a receipt for money paid by the consignee?

Mr. Wulff: I can't argue that. I am just telling you what is being done.

Mr. Robertson: Well, in other words, so we can clear the record then, will you stipulate that there is no receipt in the files of the Southern Pacific Company signed by Coons receipting for the delivery of these animals?

Mr. Wulff: I will stipulate that in no shipment are receipts for goods shipped taken, as far as my knowledge——

Mr. Robertson: I won't accept that. I will produce the [230] evidence.

Mr. Wulff: What is the next thing?

Mr. Robertson: The next thing is any and all documents in possession of Southern Pacific Com-

pany relating to or pertaining to care of said animals as Sacramento.

Mr. Wulff: They were delivered to Coons on the 16th and were to be delivered back to us and loaded into a car on the 18th.

Mr. Robertson: Do you have in your files a document signed by Coons agreeing to feed and care for them?

Mr. Wulff: No; because the legal obligation was upon him by contract and by law.

Mr. Robertson: But you have no written document in the files in which you got an indemnity agreement or hold harmless agreement from Mr. Coons for feeding the animals in case of endangering anyone?

Mr. Wulff: It is his obligation by contract and under the statute to feed them.

Mr. Robertson: I am only asking if you have one, not the obligation.

Mr. Wulff: There is no such thing.

Mr. Robertson: There is no written authority in your files of any kind authorizing him to feed, signed by Coons?

Mr. Wulff: No; there wouldn't be.

Mr. Robertson: Of course, your Honor, I am not stipulating [231] to this statement of counsel.

Next, any document, contract or receipt in possession of Southern Pacific Company showing the payment to Southern Pacific Company for services rendered relating to the shipment of said animals.

Mr. Wulff: Coons didn't pay the Southern Pacific Company. I haven't checked where it was

paid, but he either paid the Texas Pacific Railway or he paid the Northwestern Pacific Railroad at Santa Rosa. But I have the waybill here, the freight waybill, in which I assume you would be interested. It shows the diversion and shows where they were watered and shows all the data. I have photostatic copies of those. The back shows the receipt by Coons for the shipment in Santa Rosa where he certifies to all the horses.

Mr. Robertson: That is the receipt I am talking about.

Mr. Wulff: That is not a receipt, though. You read it. It deals with what was slaughtered.

Mr. Robertson: It says here, "I hereby certify that all of the horses, mules, burros or asses received at Santa Rosa, California, in Cars AT27608 and AT29117, shipped from Texarkana, Texas, on 12-9-54, were purchased by me from Haas Owens and were slaughtered at Santa Rosa, California, within 30 days after date of arrival."

In other words, this is what I have in mind——

Mr. Wulff: This is not a receipt, though. [232]

Mr. Robertson: That becomes a legal question. Thank you, sir.

Mr. Wulff: Now, I have photostatic copies to be substituted. These are original documents.

Mr. Robertson: We will introduce the originals and stipulate the photostats may be substituted.

Now, your Honor, I am prepared to call Mr. Fisher.

The Court: I suggest in the interests of saving time, you examine those documents that have been

submitted to you in connection with this matter so that when the time comes you can simply offer the photostatic copies, rather than to go through the gyrations of having the originals come in here and having the clerk have to make an entry and then make another entry to get them out. If you are satisfied they are duplicates and Mr. Wulff has provided, he can't make any objection.

Mr. Wulff: I provided them to be photostated.

The Court: All right. Well, I suggest that you spend the next few minutes then doing that and we take a recess until the hour of 1:30.

Mr. Robertson: I have one other matter, your Honor.

The Court: All right.

Mr. Robertson: When this matter was transmitted to the Federal Court the original deposition of Doctor Henning was transmitted, and I have it here and I would like to file it [233] with the Court at this time.

There are X-rays, may it please the Court, that go with this deposition, which we had loaned to counsel and they have returned them and our doctor has them, so we will bring them in at 2:00 o'clock.

Mr. Diepenbrock: I would like to bring up one thing, your Honor. We have a professional witness we wish to put on, and I understand arrangements have been made for him to be here to give his testimony at 10:00 o'clock tomorrow morning, and even though the plaintiff's case may not be finished by that time——

Mr. Robertson: I have no objection to their put-

ting a witness on out of turn, subject to whatever your Honor's wishes are.

Mr. Wulff: Well, I prefer to put our case in in the orderly way, and I will see if we can arrange it. If we can't we will have to do that.

The Court: Well, whatever you wish. I gather there is no objection on the part of Mr. Robertson or Mr. Miller?

Mr. Miller: No objection.

The Court: I understand this deposition here—are you going to put it in evidence?

Mr. Robertson: I am going to read it in evidence, your Honor. I am merely now filing it.

The Court: Well, why spend that time? Why don't you [234] stipulate that I can read it and I will take it and read it tonight and we can just save that much courtroom time for all of us.

Mr. Robertson: Are you willing to stipulate that it may deem to be read in evidence?

The Court: Well, then I will take it home with me tonight and read it tonight and that will save you that much courtroom time.

Mr. Wulff: I will stipulate it be introduced in evidence as a deposition.

Mr. Robertson: Yes.

The Court: All right, then. Why not let the deposition come in evidence right now, then, as Plaintiff's Exhibit 15?

Mr. Robertson: And that the X-ray exhibits attached to the deposition be admitted as a part of it; is that correct, counsel?

Mr. Diepenbrock: I don't know about that.

Mr. Robertson: There were several sets of X-rays and doctors' reports and so forth.

Mr. Diepenbrock: I think we would like to give that some further thought over the recess.

Mr. Wulff: There are certain of them that are objectionable.

Mr. Robertson: What is that, the X-rays?

Mr. Diepenbrock: The X-ray reports.

The Court: Well, it was the X-rays and not the reports, [235] as I understood counsel.

Mr. Wulff: He said X-ray reports.

Mr. Diepenbrock: I understood he was offering both of them with the deposition. Now, it may be that we have no objection to the X-ray reports of the radiologists who took the X-rays.

The Court: Well, under ordinary circumstances they wouldn't be admissible even if Doctor Henning was here.

Mr. Wulff: That is correct, technically speaking.

The Court: The reports themselves, unless they come within the business records rule. Was it your intention to offer those as a part of the deposition?

Mr. Robertson: Yes, your Honor, as part of the deposition these X-rays were submitted.

The Court: We are talking about two different things. They are talking about the reports of the roentgenologist, or whatever they call those gentlemen, that were submitted to Doctor Henning, and even if Doctor Henning were called as a witness here, you couldn't put those reports in in the ab-

sence of them coming in under the uniform business records rule.

Mr. Wulff: They are clearly not a part of the deposition. Our stipulation at this stage merely runs to the deposition.

Mr. Robertson: May it please the Court, I am not making an argument. I am trying to make a statement of fact——

The Court: Well, what I want to get clear here is, do you have any objection to the X-rays themselves? [236]

Mr. Diepenbrock: No, your Honor.

The Court: In other words, it is only the self-serving or the hearsay or whatever you want to call it statements of the roentgenologists that accompany them which you don't want, is that it?

Mr. Diepenbrock: We don't want to stipulate to it as of now, your Honor. We would like to have the noon recess to consider that phase of the matter.

Mr. Robertson: You see, your Honor, each one of these things were marked for identification in the deposition. Now, when your Honor reads this deposition, I think you will conclude that the other party did use these reports in the deposition itself, and your Honor may deem that is a waiver.

As a matter of fact, I want your Honor to be fully informed what the facts are. There are certain X-rays that are marked for identification and then there is doctor's report, and your Honor may rule that is not admissible. I want you to know that. I don't think your Honor can rule on it intelligently until you read the deposition.

Mr. Wulff: Have I seen these reports? I don't think I have.

Mr. Robertson: No. Mr. Diepenbrock has.

Mr. Diepenbrock: I have seen them.

The Court: Well, all I want to get straightened out is, I am going to admit this deposition of Doctor Henning in evidence and also the X-rays that are referred to in it, but I [237] am not going to at this time admit into evidence any documents or any self-serving or hearsay statements that may have been made by some doctor, except that if Mr. Wulff and Mr. Diepenbrock want to consider and agree that they can come in, then they can come in.

Mr. Wulff: By stipulation.

The Court: But I will reserve my ruling until I have read the deposition as to those matters and I will determine at that time in the absence of consent on the part of Mr. Wulff and Mr. Diepenbrock in the meantime.

Mr. Robertson: Thank you.

The Court: All right. Now, that straightens that out.

Mr. Robertson: Yes. What number is that?

The Court: Plaintiff's Exhibit 15. And I think, so the record may be kept straight, that the X-rays that are referred to in that will simply remain a part of that particular record unless they are otherwise placed in evidence and I will in some way identify them, attaching them to the deposition.

Mr. Robertson: Yes. They are identified in the deposition by identifying numbers, your Honor.

The Court: Yes. For the moment I am not going

to do anything more than just leave them stand as the exhibits attached to the deposition.

Mr. Robertson: Yes.

The Court: But I will consider the X-rays, but I will [238] not consider any statements until I have read the deposition or the consideration has been consented to by Mr. Wulff and Mr. Diepenbrock. If they don't stipulate, then I will determine whether or not they are legally admissible.

Mr. Robertson: And for the purposes of the record, the deposition is in evidence, it may be deemed to have been read into the record, and in the event of appeal by either party, will be copied as a part of the transcript on appeal.

The Court: That is right. It is deemed to be before the Court as though it had been fully read here in court.

Mr. Robertson: Thank you.

The Court: I am going to take it home and read it tonight.

(The deposition referred to was marked Plaintiff's Exhibit No. 15 in evidence.)

(Thereupon an adjournment was taken until 1:30 p.m. this date.) [239]

Afternoon Session

Wednesday, March 7, 1956—1:30 P.M.

Mr. Miller: Your Honor, the last I saw of Mr. Robertson he was with the doctor and he was having difficulties parking the doctor's car, so it will be a couple of minutes.

May we have the originals of the documents?

Now, with regard to these originals and self-repeating copies of them, I think we might run into a little difficulty, because in examining the photostats during the lunch hour, we find they do not show up a lot of changes and alterations that have been made nearly so well as the originals, and also on one of them, the diversion request, there are two different types of ink used that we would like to have explained.

Now, I don't know precisely how we can handle this. I suggest——

The Court: The only way it can be handled is, if you insist, to put the original document in evidence, and they can be withdrawn when the case is disposed of.

Mr. Miller: Would that be satisfactory to you, Mr. Wulff?

The Court: It is not a question of whether it will be satisfactory to anybody. The Court so orders. In other words, the documents will be made available just as quickly as we are through with them in this case.

Mr. Miller: Yes; we will stipulate to the withdrawal after the case—— [240]

The Court: We don't need a stipulation; I can make that order.

Mr. Wulff: May we have an order to that effect?

The Court: Yes, you may have that order right now.

Mr. Miller: I would like to offer into evidence at this time first of all the diversion request dated December 18, 1954.

Secondly, I would like to offer——

The Court: Wait a minute. Let's get this taken care of. Let that be marked Plaintiff's Exhibit 16.

(The document referred to was marked Plaintiff's Exhibit No. 16 for identification and in evidence.)

Mr. Wulff: Now, the original livestock contract is being photostated and will be here in ten minutes.

Mr. Miller: That will be fine. I think with regard to that, we won't need the original.

The livestock freight waybill for car No. AT27608, dated December 9, 1954, we offer that in evidence at this time.

The Court: It will be received and marked Plaintiff's Exhibit No. 17.

(The document referred to was marked Plaintiff's Exhibit No. 17 in evidence.)

Mr. Miller: The livestock freight waybill for car No. AT29117 with a certificate pasted to the reverse side—the waybill is dated December 9, 1954, and the certificate is dated December 22, 1954—I offer into evidence at this time. [241]

The Court: Plaintiff's Exhibit 18.

(The document referred to was marked Plaintiff's Exhibit No. 18 in evidence.)

Mr. Miller: Your Honor, for what it is worth I have a United States Geographic Survey map which I obtained from the office of the United States Geographic Survey in Sacramento, together with a pamphlet explaining the marking on the map, published by the United States Geographic Survey.

I might say that this map is of the Sacramento west quadrangle; it shows the topography of the general area of Broderick, Bryte and West Sacramento.

I might say that this map does not show—this map was made before the new West Sacramento Freeway was built and does not show the new West Sacramento Freeway. I am advised that they have a copy coming out shortly showing that new freeway.

However, the map is valuable in that it shows the distances from Broderick to the old Route 40 which runs to the north of the new Route 40.

I would like to offer the map of the Sacramento West Quadrangle and a pamphlet published by the United States Geographic Survey, which accompanies the map, into evidence at this time.

Mr. Wulff: If your Honor please, the only objection I have is that it is pre-freeway. The cross-overs are not there, the [242] locations are not there. There is a very substantial difference between the location of the freeway and the old Route 40 which is now West Capitol Avenue. I think it is going to tend to confuse and not to help.

The Court: Well, I am inclined to agree with you. In other words, it is a map that is out of date, and you tell me the only purpose you want to offer it is because it shows some distances. Why can't you go out there in an automobile and drive those distances, you gentlemen ought to be able to stipulate to that. If you can't do it, maybe you would be willing that I drive my car out there and find out.

Mr. Wulff: We will be perfectly happy to stipulate——

Mr. Miller: Your Honor, I was going to suggest that it might be advisable at this time, if Mr. Wulff is willing to stipulate, that we stipulate that the Court can examine this whole area that is involved in this particular accident. In other words, to go out and take a view of the West Sacramento Freeway and a view of the corrals between 7th and H Streets on into Broderick. Would that be satisfactory, Mr. Wulff?

Mr. Wulff: Your Honor, there is one very serious objection to it which I have learned through years of practice to my very severe detriment. In other words, you waive your appeal when you do that, because any judgment may be affirmed on something the judge may have seen out there. Unless the judge and counsel are willing to enter into a stipulation that [243] the judge hasn't seen anything except that that is introduced into evidence in open court——

The Court: I am not going to have any half-way stipulation or half-way agreement.

Mr. Wulff: Therefore under those circumstances I cannot stipulate because you waive an appeal.

Mr. Miller: I think it would be proper at this time for the plaintiff to request that the Court—there seems to be a serious doubt in the Court's mind or a serious question in the Court's mind as to the grade and slope of the Park Street Overpass and the location——

The Court: You assume something that is not in evidence when you say that. The only doubt in the Court's mind is what the witness is trying to say, and I still don't know what the witness is trying to say, I will tell you very frankly. One moment he will tell me that for a quarter of a mile you couldn't see the road ahead, the next moment he said you can. I might as well be perfectly blunt with you and tell you that the traffic officer made a very poor impression on the Court. For a man who is as skilled as you propose to be, his testimony, in my opinion, is practically worthless.

That is not to be taken as any indication as to how I may feel about the overall testimony, but I don't want you to get any impression that I was putting in my personal views about the matter in the record, because that wasn't it. I was trying [244] to find out from that witness what he meant, and I would be less than honest with you if I didn't say I never did find out.

Mr. Miller: Well, I think, your Honor, that if you examined that overpass in an automobile as I have examined it personally, I feel that actually seeing it, a lot of things that the highway patrolman

said would be clear in the Court's mind after that examination was made, and I request at this time that the Court examine the Park Street Overpass and also examine—not the corral itself, but the area of the corral, to determine distance, or I could myself, I could take a car and I could drive from the freeway to the corral and give the Court an exact measurement of the distance.

But I would suggest very strongly and do request that the Court examine the Park Street Overpass and the West Sacramento Freeway.

The Court: Well, I think I have no right to examine anything outside of this courtroom in the absence of a stipulation of the parties.

Mr. Wulff: If the Court would be willing to state in open court to the reporter what he saw when he went out there—all I am asking for is we have a record of it, your Honor, that is all, and I think both litigants are entitled to that.

The Court: Well, I am not questioning your right on that matter. I am simply saying that I am not going to be assuming the burden of trying this case for you gentlemen, and that is [245] tantamount to what you are asking me to do on both sides. You are asking me to go out here and look at things so you won't have to produce evidence, and Mr. Wulff is asking me to come back here and tell you everything I saw so he won't have to produce evidence in that regard.

I think you are both within your rights, but I think you are casting an undue burden upon the Court, and I decline to do it.

Mr. Miller: Your Honor, at this time I have the carbon copy of the uniform livestock contract covering the animals in question; it is dated December 9, 1954, and I would like to offer this into evidence at this time.

Mr. Wulff: That is the carbon copy?

Mr. Miller: The carbon copy. I understand——

Mr. Wulff: I think that is better, because that small print is hard to read on the photostatic copy.

The Court: Plaintiff's Exhibit 19.

(The document referred to was marked Plaintiff's Exhibit 19 in evidence.)

Mr. Wulff: That may be substituted, your Honor, the same way as all of them, when the case is through?

The Court: The same order is made as to all of them, when the case is through, the exhibits can be released to the parties who produced them.

Mr. Miller: Thank you, your Honor. [246]

Mr. Robertson: Your Honor, I could call Sigmund Fisher, but I wish to not call him at this time. The medical doctor is here in court. Doctor Sanderson, please.

(Doctor Herbert C. Sanderson was called and sworn as a witness for the Plaintiff, and his testimony is omitted from this transcript.) [247]

SIGMUND A. FISHER

called as a witness on behalf of the Plaintiff, sworn:

Direct Examination

By Mr. Robertson:

Q. Mr. Fisher, would you state, please, by whom you are employed?

A. By the Southern Pacific Company.

Q. And how long have you been so employed?

A. October 9, 1917.

Q. And what was your position of employment with the Southern Pacific Company around December 17, 1954?

A. Freight Agent.

Q. And did you hold that position as freight agent for some time before that date?

A. Let me see. July 1st, 1952.

Q. So from July 1st, 1952, to the present time you have been the freight agent?

A. I have.

Q. Would you please tell His Honor what your duties are as freight agent for the Southern Pacific Company?

A. Well, I supervise the Sacramento freight station, the employees, and also the solicitation of freight.

Q. Also as a part of your duties are you in charge of the Washington Street corrals of the Southern Pacific Company at Broderick?

A. I am. [248]

Q. And insofar as being in charge of the Washington Street corrals, what are your duties in respect to those corrals?

(Testimony of Sigmund A. Fisher.)

A. To see that they are properly maintained and so forth.

Q. And what do you mean by the "and so forth"? What else are your duties in relation to them?

A. To maintain the corrals.

Q. Maintain the corrals? Are you required to inspect them periodically?

A. To make inspections, yes, periodic inspections, I do.

Q. And how often are you required to inspect them?

A. Oh, I generally make them once a month.

Q. Are there any written instructions pertaining to your position as freight agent that you know of that were prepared by your employer Southern Pacific Company?

A. No.

Q. Are there any written instructions by your employer pertaining to your duties in the maintenance of the Washington Street corral?

A. No, there is not.

Q. Could you tell us, please, how often you inspected the Washington Street Corrals in the year 1954?

A. I couldn't tell you, sir.

Q. Do you have any independent recollection of inspecting the Washington Street corrals in the year 1954?

A. Oh, yes, I go over there once a month, but the dates I [249] cannot tell you.

Q. Is it your testimony that you have an independent recollection that during the year 1954, you went there at least once a month to inspect them?

(Testimony of Sigmund A. Fisher.)

A. Yes, sir.

Q. And during that period and prior to the day of this accident, which was December 17, 1954, from your inspections of the corral, did you order any changes made in the structure of the corrals in any way?

A. Beg your pardon? What was that question again?

Q. As a result of your inspections of the Washington Street corral in the year 1954, up to the time of the accident in December, did you cause any repairs or corrections to be made to the corrals themselves at Washington Street?

A. Prior to the accident.

Q. You did? Just prior to the accident?

A. No, during the year.

Q. During the year. Do you know when that was done? A. No, I do not.

Q. Do you know what repairs you ordered to be made to the corrals in 1954?

A. Well, occasionally there was the valves connected there that feed the watering troughs, and I believe there was some feed racks repaired. I do not have a list of the repairs, so I don't know. [250]

Q. You do not have a list?

A. No, I do not.

Q. If you inspect the corral up there and you see something that should be done, how do you cause the repair to be made?

A. I phone the bridge and building supervisor.

(Testimony of Sigmund A. Fisher.)

Q. And is any written memorandum, such as a work order, sent to him for that?

A. No, I do not send him any.

Q. After the repairs are accomplished, does the Bridge and Building Department cause you to sign any work order showing work done?

A. No, he does not.

Q. Of your own knowledge does the Southern Pacific Company maintain any written record of the repairs or alterations made on the Washington Street corral?

A. I don't know if the Bridge and Building Department does, I do not know.

Q. Of your own knowledge, you have never seen any yourself?

A. I have never seen any, no, sir.

Q. Prior to the accident do you know of your own independent recollection whether or not any repairs were ordered by you to be made to the gates of the Washington Street corral?

A. I don't remember.

Q. You don't remember?

A. I don't know, sir. [251]

Q. You don't know? A. No.

Q. Now, by that do you mean you don't know whether you ordered any, is that correct?

A. That is right.

Q. Do you know whether any repairs were made to the gates of the corrals prior to the accident?

A. I don't know.

Q. However, you did inspect them once a month?

(Testimony of Sigmund A. Fisher.)

A. Yes.

Q. Now, Mr. Fisher, can you tell us, please, how the gates of the Washington Street corral were fastened prior to December, 1954?

A. Well, they have a latch, a sliding latch.

Q. So that a board would slide along horizontally to the ground and fit into a slot in a bolt, would that be it?

A. It would slide into a post, into a slot. Back of that slot is a kick block on there to prevent this latch from coming back.

Q. How do you pull the sliding lock back to open the gate, then?

A. You have to use your hand to do that.

Q. And do you know that this condition existed on the gates at the Washington Street corral on or about December 1954?

A. Yes, they were equipped with these latches.

Q. And from your own personal inspection you know that?

A. Yes.

Q. Was there any chains with steel locks to lock the gates of the corral on the Washington Street corral gates in December, 1954?

A. I don't remember.

Q. You remember they had the sliding latch?

A. That is correct, sliding latches.

Q. And do you remember seeing any chains and locks on the gates?

A. There were chains there, but whether they were locked, I do not know.

Q. Did you inspect the Washington Street cor-

(Testimony of Sigmund A. Fisher.)

rals during the month of December, 1954, and before the happening of this accident?

A. I couldn't tell you.

Q. Do you have a diary that you keep in your office showing what you were doing on given days in a given month?

A. No, I do not keep any.

Q. Do you forward any kind of a weekly or a monthly report to any superior in your company showing what you have done?

A. No, I do not, no.

Q. Is there any method by which you could ascertain whether or not from your records in your office or otherwise, whether or not you inspected the corrals prior to the happening of [253] the accident and during the month of December, 1954?

A. I do not know of any records.

Q. Mr. Fisher, are you charged as a freight agent with the responsibility for livestock that is being shipped by your railway in this area?

A. Yes.

Q. Are you notified when livestock shipments are to arrive in Sacramento on your railway lines?

A. They notify our office on the arrival of the cars in Sacramento, the yard office notifies the freight office.

Q. When you say that "they" notify, who do you mean by that?

A. I mean the yard office; we will say the chief clerk in the yard office, which is located at 12th Street.

Q. Now, let's get right into this given shipment

(Testimony of Sigmund A. Fisher.)

of two cars of mules, 27 mules, I believe, or 28 mules, in one car and 29 mules in another car, are you familiar with that shipment of mules?

A. Yes, I am familiar with it, but I don't know how many were in each car.

Q. Yes. Now that shipment of mules as appears from records in the evidence, left Texarkana, Texas, on December 9, 1954, shipped by Charles Owens, consigned to H. L. Coon, is that correct?

A. I would have to see the record to know that.

Q. I will show you uniform livestock contract, Plaintiff's [254] Exhibit 19, and ask you if that would demonstrate that?

A. Yes, sir, it would.

Q. So the statement I made a moment ago to you is correct? A. Yes.

Q. All right, now, does that agreement show how those livestock were routed?

A. Well, they originated on the Texas Pacific, and according to the routing here they moved into Sweetwater, Texas, and then were turned over to the Santa Fe at Bakersfield—no, turned over to the Santa Fe at Sweetwater, Texas, and then from there were turned over to the S.P. at Bakersfield, California.

Q. Now, from your experience can you explain this particular shipment, what you mean by "turn over"? Would there be a physical change, or a paper change?

A. No, it is an interchange point between railroads.

(Testimony of Sigmund A. Fisher.)

Q. So the mules or animals would remain in the same car? A. That is right.

Q. And then your train would pick them up and haul them from Bakersfield on into Sacramento, is that correct? A. Yes, that is correct.

Q. Could you explain, because I don't understand these things, they left Texarkana on the Texas Pacific Railway, pulled by the Texas Pacific Railway engines, is that correct?

A. That is correct.

Q. And they went to Sweetwater, Texas, is that correct? [255] A. That is correct.

Q. And there they were picked up by the Atchison Topeka and Santa Fe Railway? A. Yes.

Q. And they were brought by that railway company in the same cars to Bakersfield, is that correct?

A. As to the same cars now, I would have to see the waybills to see if they rode in the same cars or not.

Q. I will show you Plaintiff's Exhibits 17 and 18 and ask you if those are the waybills?

A. Those are the waybills, yes.

Q. And do they show that the mules remained in the same cars?

A. No, they did not remain in the same cars.

Q. What were the numbers of the cars when they left Texarkana, Texas?

A. According to the waybill they left in car TP22165.

Q. That is crossed out though, is it not?

A. That is crossed out.

(Testimony of Sigmund A. Fisher.)

Q. And is there not written where that is crossed out, in ink, "AT27608"? A. That is correct.

Q. So from that being crossed out and the other car number written in, it would appear that they left in AT27608?

A. No, I wouldn't say that. These cars possibly were transferred— [256] the waybill doesn't show here whether the cars were transferred——

Mr. Wulff: I don't know what counsel's purpose on this is. I think it is immaterial. Whether they were transferred in Texas has nothing to do with the horses being on the highway on the 17th day of December in Yolo County.

The Court: What is the purpose of the testimony, Mr. Robertson?

Mr. Robertson: The purpose of the testimony is to establish the control and possession of the S.P. of these mules and horses. We wish to show that they left in two given railway cars and arrived in Sacramento in two given railway cars, those two railway cars were held here in Sacramento for two days, and they were shipped out in the same two railway cars and arrived at Santa Rosa in the same two railway cars, and at Santa Rosa a receipt of delivery was signed by the consignee of the mules to the railroad, receipting for delivery at Santa Rosa.

I think we have a right to establish that. It is evident that if these cars——

The Court: What difference does it make what cars they were in down in Texas or Arizona or New

(Testimony of Sigmund A. Fisher.)

Mexico or anywhere, except that they arrived here in Sacramento in two cars? That is where the important testimony begins in my view.

Mr. Robertson: It makes this difference from a legal [257] standpoint: There is freight that has to be paid on these animals. They are brought in in two cars; they remain in those cars; they are unloaded; they are held here, and then they are reloaded on the same cars and they are moved out, and freight is paid for the use of those cars and the service is rendered. I think that all ties in to who has control of these animals.

The Court: Well, they were in two Santa Fe cars according to the testimony.

Mr. Robertson: No.

The Court: The Santa Fe may be the person that is responsible.

Mr. Robertson: Well, that is just the purpose I want to go into that evidence. Let me ask the witness this question:

Q. Is it usual for the Southern Pacific Railway Company to use cars of the Atchison Topeka and Santa Fe or Texas Pacific, and vice versa, for those companies to use your cars? A. It is, yes.

Q. It is the usual practice, is that correct?

A. Yes.

Q. And they are just exchanged back and forth and records are kept where those cars are, and so forth? A. That is right.

Q. And the fact that you might be hauling mules in Texas Pacific owned cars on your own lines, you

(Testimony of Sigmund A. Fisher.)

would still be paid, [258] that is, the Southern Pacific, is that correct.

A. That is right. We would be paid.

Q. The mere fact that you were using the Atchison——

The Court: Well, wait a minute now. Let's stop right there. Would you be paid for the Texas Pacific hauling the mules from Texarkana to Sweetwater?

A. I didn't get your question, your Honor.

Q. Well, according to the testimony, this shipment originated in Texarkana.

A. That is right.

Q. And they went to Sweetwater, where they were shuttled over from the—what was that, the Texas Pacific or Missouri Pacific?

A. The Texas Pacific to the Santa Fe.

Q. To the Santa Fe. Would you get paid for hauling those mules from Texarkana to Sweetwater?

A. Yes, sir, we would. We would get paid from the point of origin, which is Texarkana.

Q. (By Mr. Robertson): To Sacramento?

A. To Sacramento. We would get paid for the entire haul, which is paid by the shipper.

The Court: You would get the money for it?

A. Yes, we get the money.

Q. Well, who gets to keep the money?

A. Well, then, this money here is—the Texas Pacific and [259] the Santa Fe, they will get a proportion of the through rate through an auditor's settlement.

(Testimony of Sigmund A. Fisher.)

Q. Well, don't you figure out the number of miles that each railroad pulls the car, and they get that percentage on some schedule that is filed with the Interstate Commerce Commission?

A. Yes. We don't do that here, your Honor. That is done in San Francisco.

Q. But that is done in the Interstate Commerce Commission—the tariff is there.

A. That is correct.

Mr. Wulff: Now, your Honor, I think we can stipulate that where a car is routed over more than one railroad, the proceeds are collected by the designated railroad and the monies so collected——

The Court: But they don't belong to the destination railroad.

Mr. Wulff: No.

The Court: Under the rules of the Interstate Commerce that is apportioned according to the tariffs that are on file in their office.

Mr. Wulff: That is correct. The money is then apportioned among all participating carriers according to the tariffs.

The Court: I don't see what difference it makes then who was carrying them down in Texas or New Mexico or Arizona.

Mr. Robertson: I am merely trying to trace for the record [260] and establish for the record the carriage from there to here.

The Court: What difference does it make?

Mr. Robertson: I think, your Honor, we are en-

(Testimony of Sigmund A. Fisher.)

titled to ascertain what that is. Now, this is the tract——

The Court: If it is just for educational purposes, you do that outside of court, but if it has some legal bearing, all right.

Q. (By Mr. Robertson): Mr. Fisher, isn't it a fact that for the carriage from Bakersfield, California, to Santa Rosa, California, of these horses and mules, the Southern Pacific Company would receive compensation? A. Yes, they would.

Q. All right. Now, will you tell us what were the numbers of the railway cars on which these mules arrived in Sacramento?

A. I would have to see the records.

Q. All right.

A. According to the waybills it would be——

Mr. Wulff: Here is the switch list, if you want it. This shows that they came into Sacramento.

Q. (By Mr. Robertson): I will show you the stock book, Plaintiff's Exhibit 1 in evidence, the feeding yard record, that is a record kept of cars that come in, is that right, when livestock are unloaded? A. Yes.

Q. And does that stock book indicate what the numbers of the [261] cars were?

A. Yes, it does.

Q. All right. And does AT29117——

A. That is right.

Q. ——29 head, and AT27608, 28 head——

A. That is right.

(Testimony of Sigmund A. Fisher.)

Q. Those are the cars that arrived in Sacramento with the mules, is that correct?

A. That is right.

Q. All right. Now, do you know what disposition was made of those two railway cars after December 16, 1954?

A. After? According to the records, they went to Santa Rosa, California.

Q. And when did they go to Santa Rosa, California?

A. We received the diversion order, I believe it was, on December the 18th.

Q. From whom did you receive the diversion order? A. From H. L. Coon.

Q. And that is, as I show you here, Plaintiff's Exhibit 16 order? A. That is right.

Q. And what does that order, diversion order, show with regard to the shipment of the mules from Sacramento to Santa Rosa?

Mr. Wulff: I think the document speaks for itself, unless [262] you want something explained on there.

A. I don't know what you want.

Q. (By Mr. Robertson): All right. Does it show that the mules went out in the same railroad cars that they came in on?

A. Yes, it does. The diversion order applied to the same two cars, yes, sir.

Q. Therefore the two cars that the mules were brought in on on the 16th were the same two cars

(Testimony of Sigmund A. Fisher.)

used in which the mules were shipped from Sacramento to Santa Rosa, is that correct?

A. That is right.

Q. And can you tell us would those cars have remained over at the stockyards for those days awaiting the trip to Santa Rosa? Do you know what happened to the cars?

The Court: Let me hear the question.

Mr. Robertson: I'd better withdraw it. It is a little cumbersome, your Honor.

The Court: All right.

Q. (By Mr. Robertson): Do you know whether or not those two railroad cars were left spotted right there at the Washington Street Corrals from the 16th of December to the 18th of December?

A. I don't know that without referring to the yard check; whether they were pulled away from there or not, I do not know.

Q. Would you be kind enough this evening to refer to the yard check and then let us know tomorrow? Can you do that, [263] Mr.—

A. I think so, if they are available.

Q. How long does your company keep the yard check records on file?

A. Well, there is various dates as to the length we should keep each record.

Mr. Wulff: If they are available, we will get that for you. Let's make it short.

Q. (By Mr. Robertson): You will make the survey?

A. If it is available, yes, I will get that.

(Testimony of Sigmund A. Fisher.)

Q. That is all we ask. Now, Mr. Fisher, can you tell us in the uniform livestock contract which is in evidence here as No. 19 for the plaintiff, or in the two bills of lading which are Plaintiff's 17 and 18, is there any reference in those contracts as to feeding and watering of livestock while they are en route from the point of origin to Sacramento?

A. Well, the waybills here show that they were unloaded at Sweetwater, Texas.

Q. No. Maybe I misunderstand. First——

Mr. Wulff: He is answering the question. You asked the question whether the waybills showed——

Mr. Robertson: Let him answer it and then I will move to strike as not responsive.

The Court: Well, your motion will be denied. Now let's quit this foolishness here and get down to business. If you are just asking him what is in those papers there, I can read [264] it as well as he can. Now, if you have got some point, make it.

Mr. Robertson: I am making the point, your Honor, which is one of the most elemental points in this case, who is to feed or water these animals.

The Court: Well, all right. I am the one who is to determine that, not that witness there.

Mr. Robertson: The document, your Honor, I want to find out from the document——

The Court: Mr. Robertson, you may not think so, but I can read.

Mr. Robertson: I understand that.

The Court: And those documents are the best evidence, and this witness here can testify until he

(Testimony of Sigmund A. Fisher.)

is blue in the face that there is something in there that isn't in there, or that there isn't something in there that is in there, and it won't have any bearing at all in this case. Now, that is a fundamental principle of law, that written documents speak for themselves, and no oral testimony is of any value in connection with them.

Mr. Wulff: Your Honor, may I be of assistance to cut the time short on the situation? The contracts themselves refer to the tariffs, and the tariffs provide for the feeding and the watering. I have the tariffs here if counsel is interested. But the witness can——

The Court: I just don't want any more examination by [265] either side of a witness asking him what a document says, because if it is to be interpreted, I will interpret it. If it is there in black and white I can read it.

Mr. Robertson: If it please the Court, do I understand that I am not to show that these documents demonstrate that these horses were pulled off at a given point and watered and fed by the S. P. and the other railroads? That is what I want to get, and we can get it very fast.

The Court: It doesn't make any difference whether they were pulled off and watered and fed every mile between here and Sacramento. What I am interested in is what happened here in Sacramento and what law and what rules govern the handling of stock here in Sacramento.

Mr. Robertson: If I can briefly state why, then

(Testimony of Sigmund A. Fisher.)

I think your Honor will agree. These records will show that the last time the horses were fed and watered was in Barstow, California, at 2:10 a.m. on December 14th, and that was two days and eight hours later they arrived in Sacramento. That is 58 hours later they got in Sacramento. Our purpose is, and the law is cited to your Honor, that they are required to be taken off and fed every 36 hours. That is our purpose.

The Court: Mr. Coon isn't here suing the Southern Pacific because of their failure to properly care for the animals.

Mr. Robertson: No, but the law provides that the carrier must remove and feed and water them or they have committed a [266] misdemeanor. We are trying to show that they were taken off at Sacramento——

The Court: Then you go to the State court and file a complaint against the Southern Pacific for failing to meet their obligations, but not here.

Mr. Robertson: Well, we are trying to show, your Honor——

Mr. Wulff: You misread the bill of lading, number one——

Mr. Robertson: We are trying to show, your Honor, that they were taken off here to be fed and watered by the Southern Pacific pursuant to their duties under the law.

Mr. Wulff: I beg your pardon.

The Court: Wait a minute, Mr. Wulff. I have got enough trouble here without you getting in on it.

(Testimony of Sigmund A. Fisher.)

Mr. Wulff: I beg your pardon.

The Court: If you want to and can show that, I will permit you to do it. But whether they were fed and watered in Barstow—the Southern Pacific didn't even have them in their custody in Barstow, the Santa Fe had them. So if there was a misdemeanor committed, it was committed down in Imperial County or Kern County or somewhere—I don't know when the Southern Pacific got possession of them, but I doubt if they had them in their possession for 36 hours. Just from the law of averages, I just suspect that they didn't have them in their possession for 36 hours between there and here, and if you want to show and can show that they took them off here [267] for the sole and exclusive purpose of watering and feeding them, I will listen to the testimony.

Mr. Robertson: That is what I am trying to elicit. Therefore I have to show the last place they were fed and watered.

The Court: That doesn't prove a thing, doesn't prove a thing.

Mr. Robertson: Oh, yes.

The Court: Suppose they were taken off at Modesto and fed and watered there and the Southern Pacific Company elected to take them off and feed and water them here again in Sacramento, would that mean then that you would be precluded from showing that they had taken them off to feed and water them? I think not.

The mere fact that they fed and watered them

(Testimony of Sigmund A. Fisher.)

too frequently wouldn't preclude you from showing that they were taken off here for feeding and watering, and the fact that they were taken off not frequently enough doesn't mean that the other side is bound by what some other railroad did, or didn't do.

Mr. Robertson: No, your Honor, but I think you will find when we submit authorities at the appropriate time, that when two or more carriers engage in this, that they are all still bound by the 36-hour rule, regardless of what railroad was last to feed, and animals cannot be transported in a closed train for more than 36 hours no matter who is transporting them, [268] and therefore if the Southern Pacific picks up these two carloads of horses and mules within a given period of time and looking at the waybills see that within eight hours they have to feed them, it is their job then, within eight hours to pull over and feed them.

Mr. Wulff: That is not true. But I don't want to get into an argument. When they got to Sacramento they arrived at their destination.

The Court: Well, we have taken all the time we can take today. We will stand recessed until the hour of 10:00 a.m. tomorrow morning, at which time we will return and resume the trial of this case.

Mr. Robertson: Could I ask one question on your Honor's procedure? Does your Honor usually submit these cases on briefs?

The Court: Well, I can't tell until I hear the case. I would say probably not. I would probably prefer to have an argument, but if it develops that

(Testimony of Sigmund A. Fisher.)

there are half as many complicated law problems that both sides have been posing to me here, I may ask you to file a memorandum.

Mr. Robertson: I am just going to recommend that. I was just wondering about my own plans of preparing, and so forth.

The Court: Well, you better be prepared to argue, but I will tell you better when I hear some of the defense in the case.

Mr. Robertson: Thank you.

(Thereupon an adjournment was taken until Thursday, March 8, 1956, at 10:00 a.m.) [269]

March 8, 1956—10:00 o'Clock A.M.

SIGMUND A. FISHER

resumed the stand and testified further as follows:

Direct Examination

(Continued)

The Clerk: Case No. 7317, Grigg versus Southern Pacific Company, further trial.

The Court: Proceed, gentlemen.

Mr. Miller: Your Honor, as the Court suggested, I made some measurements with my automobile speedometer this morning, and I would like to make a statement as to those measurements if opposing counsel has no objection.

Mr. Wulff: I don't know whether I have or not.

(Testimony of Sigmund A. Fisher.)

Mr. Miller: I think for illustrative purposes here I might use the blackboard.

The Court: Why don't you do this: When court is not in session you gentlemen get together. If you can't get together on it, I can very easily hire somebody to go out there and I will charge it to both parties in this action here now. There is no sense in quibbling over a matter that is as ordinarily plain and simple as this is.

Mr. Wulff: I haven't quibbled over anything, your Honor.

The Court: I am not accusing you of quibbling over it; I am simply suggesting that I don't want any quibbling over it. No accusation is directed to anyone. [270]

Mr. Robertson: Maybe we can arrange a stipulation.

The Court: That is what I said. Why not do it outside of the hours of court here, because you have witnesses waiting and you have other people, and that is something that is too simple to require the taking up the time of the Court, in my opinion. I am sure that both sides—I have nothing to criticize anybody for—I think both sides will be perfectly reasonable about the matter.

Q. (By Mr. Robertson): Mr. Fisher, did you look for the records that we spoke about last night as to the two cars?

A. Yes, I have them in here. It indicates that the cars were on the corral track over there at 8:10 a.m. December the 17th. There was no yard check

(Testimony of Sigmund A. Fisher.)

taken on Saturday, which is the 18th, so all I can give you is as to the 17th.

Q. The two cars were over there?

A. Yes, they were over there.

Q. On the 17th? A. On the 17th.

Mr. Wulff: Witness, did you state what time they were there? I didn't hear you.

A. 8:10 a.m.

Q. (By Mr. Robertson): And, Mr. Fisher, subsequently by the receipt appearing on the back of Plaintiff's Exhibit 18, a bill of lading, those were the same two cars that were taken to Santa [271] Rosa?

A. This is not the bill of lading. This is the certificate that they are there for slaughtering purposes.

Q. It is on the back of that car? A. Yes.

Q. Now, Mr. Fisher, these cars went all the way through from Texas to Santa Rosa, is that correct?

A. Yes.

Q. Mr. Fisher, just one or two other things: These livestock freight waybills which are Plaintiff's Exhibits 17 and 18 in evidence, are they the usual type of documents that accompany the livestock shipment? A. Yes, they are.

Q. And would these be the only documents?

A. They would be the only documents.

Q. And these are the customary instruments?

A. Yes, they are.

Q. Now, there are just one or two things further on this. I notice here it says on Plaintiff's 17, "Has

(Testimony of Sigmund A. Fisher.)

36-hour request been signed and filed at point of origin?" and the answer is, "Yes." What does that mean? What is a 36-hour request?

A. It is covered by law there that the shipper can request the animals to be—to remain in the car for 36 hours.

Q. Then down at the bottom of each of these two waybills there are some times and figures giving various points, and what do those indicate [272] generally?

A. They indicate feeding records or stopping-in-transit records.

Q. Now, Mr. Fisher, the corrals out on Washington Street and that open area adjacent to the corrals up to the street, is that owned by Southern Pacific? A. I don't know, sir.

Q. You don't know? A. No, I don't.

Mr. Robertson: Counsel, perhaps we could stipulate, to save time, if you know, can you stipulate the Southern Pacific Company owns the land upon which the Washington Street corrals are situated and that open area adjoining them?

Mr. Wulff: I have no knowledge myself.

Q. (By Mr. Robertson): I will have to prove that. Would there be somebody at the Southern Pacific Office who would know that, Mr. Fisher?

A. Yes, I believe the Engineer's Office would know that.

Q. What would be the name of the man?

A. Mr. Hargraves.

(Testimony of Sigmund A. Fisher.)

Mr. Wulff: I can check it. I have never checked that. I don't know.

Mr. Robertson: I wonder if we could check that and perhaps arrive at a stipulation to save bringing in the witness.

Mr. Wulff: I think that is immaterial. Title is not concerned. It is who had possession and control of the horses. [273]

The Court: Well, when you can, you will check it?

Mr. Wulff: If he wants me to check it, I will have it checked.

The Court: All right. Suppose you check it. I think in the long run it will save time.

Mr. Robertson: Thank you.

The Court: I don't know whether it is material at this stage of the case or not.

Q. (By Mr. Robertson): Just one other question. When a request is made on the 36-hour matter, as stated in the bill of lading, the animals are removed from the box car, fed and then reloaded again, is that right? A. Yes.

Mr. Robertson: That is all.

Cross-Examination

By Mr. Wulff:

Q. I note pursuant to the livestock contract that they have reference to the tariffs mentioned there being a part of the contract. A. That is right.

Q. Now, I think to save time, if your Honor please—could you tell us where, either in the con-

(Testimony of Sigmund A. Fisher.)

tracts or in the tariffs, there appear the obligations of loading and unloading the shipment? I am speaking now at the start of the shipment and at the destination of the shipment. Where does that appear, in the contract or in the tariffs? [274]

A. That would be on the contract.

Q. Would you point that out? This is such fine print, your Honor, I think it would be of convenience to point out where it appears, and then the contract speaks for itself thereafter.

Mr. Robertson: As you stated before, your Honor, the contract is something that your Honor will read and it speaks for itself.

The Court: The only thing he is doing is pointing out some particular point or place. I don't want it read, but I think if it is pointed out and perhaps even marked with a red pencil or something.

Mr. Wulff: To save the bother of reading all the fine print.

The Witness: Yes; I can hardly read it myself. It says, "Section 4"—

The Court: Don't bother reading it.

Q. (By Mr. Wulff): Would you mark that, please? Do you have a red pencil?

A. I have a red pencil.

The Court: Put a line right at the side of that.

Mr. Robertson: I object to the marking of the document wherein it would involve the conclusion and opinion of this witness as to——

The Court: All right, if you object, Mr. Robertson, don't put the mark on that. If you don't want

(Testimony of Sigmund A. Fisher.)

me to have that help, Mr. Robertson, it is perfectly all right. [275]

Mr. Robertson: Well, I would like your Honor to have all the help, it is only——

The Court: Well, your objection certainly doesn't indicate that. Proceed. Don't waste any more time.

Q. (By Mr. Wulff): Now, relative to the obligation of feeding and watering in transit, where does that appear, in the contract or in the tariffs?

A. It is in the tariff and also in the contract.

Q. Will you show it to us in the contract?

The Court: There is no use going through that, Mr. Wulff. Mr. Robertson objects to your marking it.

Mr. Wulff: I do desire to have the witness call attention to the tariff.

The Court: Well, that part of the thing, but there is no need of him pointing out any particular point, I just have to read the whole thing.

Mr. Wulff: I don't think the Court would know the tariff. Of course, the Court can take judicial knowledge of this.

The Court: I understand that, but the tariff is not in evidence at the present time. I assume it will be before we get through.

Q. (By Mr. Wulff): What provision of the tariff has reference to feeding and watering? Can you find that for us? A. Yes, sir, I have it.

Q. All right, and will you read it, please? [276]

A. It is quite lengthy here.

(Testimony of Sigmund A. Fisher.)

The Court: Is this an extended document?

Mr. Wulff: No, it is not. I think it would take about a half minute.

A. It is our tariff 188-G, it is on page 13b; it says, "Rules and Regulations indicating charging"—

The Court: Well, let me ask you—

A. "Charge governing"—

The Court: These are the tariffs that are filed by you with the Interstate Commerce Commission?

A. They are, sir.

Q. So that they are on file with the Commission?

A. They are on file.

The Court: Proceed.

A. —"feed, water, rest, change of ownership, sorting and/or consolidation in transit of livestock at Roseville, Sacramento, San Francisco and Stockton, California, rules and regulations."

Do you want me to read the entire page or just—

Q. (By Mr. Wulff): Just read the portion—my question was directed to the portion covering the obligation of feeding and watering in transit.

A. "Item J. The custody and possession of livestock while feeding, watering, resting, sorting and/or consolidation shall be that of the owner and not the carrier." [277]

The Court: Do you have a copy of that you can put in evidence, Mr. Wulff?

Mr. Wulff: Yes, I would like to introduce it in evidence—now, there is another provision on the

(Testimony of Sigmund A. Fisher.)

same page I might speak about now and introduce that. You were reading Paragraph J?

A. J, that is right.

Q. Paragraph J. Now, you were examined on direct examination about diversion orders?

A. Yes.

Q. In other words, as shown on the face of the livestock contract, the destination of shipment was Sacramento?

A. That is right, sir.

Q. And that was the condition when the shipment arrived in Sacramento on December the 16th?

A. That is right.

Q. And that was also the same condition existing on the full day of the 17th of December?

A. That is right.

Mr. Robertson: I will object to the question, your Honor, and move to strike on the ground that it assumes something not in evidence. The contract and the waybill show the destination to be Santa Rosa and not Sacramento.

Mr. Wulff: I beg your pardon. The contract shows Sacramento. It speaks for itself. [278]

The Court: Proceed. The motion is denied.

Q. (By Mr. Wulff): Now, do the tariffs provide for how long after the arrival of the shipment at destination the shipper has a right to divert that shipment to another point?

A. Yes, it does.

Q. Now, I will show you this tariff again. Will you point out the entire provision? If it is the same page, tell us, and then point out the provision, please.

(Testimony of Sigmund A. Fisher.)

A. It is the same tariff, it is on the same page, and is Item B.

“Livestock must be forwarded from the transit point within 20 days after date of arrival. If not forwarded from transit point within the time limit, full local rate from transit point to destination will be assessed.”

Q. Now, can you take that one page out?

A. Yes.

Mr. Wulff: Would that be agreeable, your Honor, instead of having the whole book?

Mr. Robertson: May it please the Court, I would like to have the whole book to see if there is any other portion——

Mr. Wulff: That is agreeable.

The Court: Let the whole book go in evidence, then.

Mr. Wulff: I will submit the book. I am only offering one page, if your Honor please. That is all the material in there that is material to this case. There is no use cluttering [279] the record. If counsel wants to review it and introduce any other part, it is all right with me.

Mr. Robertson: There is no use introducing a part of a record——

Mr. Wulff: In other words, that is the only point dealing with Sacramento.

The Court: Well, wait a minute. The page in question will be put in as Defendants' Exhibit A in this matter. If you want to offer the whole book, you may do so and I will receive it, Mr. Robertson.

(Testimony of Sigmund A. Fisher.)

Mr. Wulff: Do you want to take that page out?

A. Yes.

The Court: Why don't you just leave it in there?

Mr. Wulff: That is all right.

The Court: What page number is that?

A. That is Page 13b, your Honor.

Mr. Wulff: Will you leave an envelope there because——

The Court: Well, the clerk will want to put a marker there, too. That will be marked Defendants' Exhibit A.

(The document referred to was marked Defendants' Exhibit A in evidence.)

Q. (By Mr. Wulff): Now, do you know, Mr. Fisher, when the shipment arrived in Sacramento at 10:00 o'clock in the morning of December 17th, who unloaded the cars?

A. No, I don't know who unloaded the cars. [280]

Q. Do you know who unloaded them?

A. According to the record there they were unloaded by Coon.

Q. By Coon. The Southern Pacific Company did not unload them, did they? A. No.

Q. Now, who took custody of the horses after unloading them?

Mr. Robertson: Object to that, your Honor, as calling for an opinion and conclusion of the witness, assuming——

The Court: Sustained.

(Testimony of Sigmund A. Fisher.)

Q. (By Mr. Wulff): After the horses were unloaded, did the Southern Pacific Company have any person over there in charge of the horses or at the corrals?

A. No, there was no one in charge of the horses. We made an inspection of the horses, as to the count and as to inspection, that is, if there were any dead animals in the car, or any injured animals. That is our obligation to make an inspection.

Mr. Robertson: Move to strike the last sentence as being an opinion of the witness, your Honor, "there is an obligation."

Mr. Wulff: I don't think he said quite that language, but——

The Court: Well, it may go out. That is not what he said, but it can still go out.

Q. (By Mr. Wulff): Now, who was left there with the horses, who stayed there with the horses, if anybody, to your knowledge? [281]

A. I don't know.

Q. But there wasn't any of your employees stayed there? A. No.

Q. Now, do you know who fed and watered the horses after their arrival in Sacramento on the 16th and 17th of December? A. No, I don't.

Q. Did the Southern Pacific Company water them? A. No.

Mr. Robertson: I object to that, your Honor, on the ground he said he doesn't know who fed them.

Mr. Wulff: Well, he knows he didn't.

The Court: Overruled. The answer will stand.

(Testimony of Sigmund A. Fisher.)

Q. (By Mr. Wulff): Do your records show who fed and watered them during that period?

A. No, our records do not show.

Q. Do you want to say why they do not show?

A. Yes, I do.

Mr. Robertson: I object to the question, your Honor, he said his records don't show that, that is it. It is immaterial as to why they don't show.

Mr. Wulff: I think there is a very important reason why they don't show, in railroad parlance.

The Court: The objection is sustained.

Q. (By Mr. Wulff): When this shipment arrived in Sacramento, did you or anybody in your office know what Coon was going to [282] do with that shipment, whether they were to remain delivered in Sacramento, or were to be later diverted, do you know? A. No, we do not.

Q. What was your previous practice on other shipments?

A. Well, his previous practice is that he gets these cars in here and then he will hold them here two or three days and then he will divert them either to Santa Rosa or to Petaluma.

Q. Did he ever dispose of any shipments in Sacramento without diverting them?

A. He has, yes.

Q. And on those occasions you didn't know what he was going to do? A. No, sir; I did not.

Q. Now, in order to divert this shipment, could he add horses to the shipment and then divert them?

(Testimony of Sigmund A. Fisher.)

A. No, they must go out with the same number of head as it came in with.

Q. With the exception of dead horses, I assume?

A. With the exception of dead horses.

Q. Now, do you know what the practice of Mr. Coon was in reference to loading and feeding in Sacramento on shipments arriving here?

A. He would feed and water his own shipments.

Q. Now, I have here a waybill marked Plaintiff's Exhibit 16 and I note on the bottom here, which you testified to be the [283] unloading record and feeding record, and I note under the title, "Sweetwater," there are some figures there in the last column under "Food and Additional Charges." Now, does the fact that that appears there mean something? A. It does.

Q. What is it, sir?

A. It means that these animals were fed by the railroad at that particular point and that indicates to us that those charges must be collected from the shipper or consignee.

Q. Now, you notice the next place is Winslow, is it? A. At Winslow.

Q. Do any charges appear there?

A. No, it does not.

Q. Does that indicate anything definitely to you? A. Yes, it does.

Mr. Robertson: I object to that as calling for an opinion and conclusion. The person may not have entered any charge.

Mr. Wulff: He can tell you.

(Testimony of Sigmund A. Fisher.)

The Court: Overruled.

A. When there are no charges appearing there, we do not protect any charge unless they appear thereon. Otherwise, why, if we—it would indicate that these animals were fed by either the shipper or the consignee.

Q. Now, I notice here on Exhibit 18 no charges appear there for Stratton, Texas. In other words, they were apparently fed [284] there by the shipper, apparently, yes.

Q. You testified that you were freight agent. You are the only freight agent in the City of Sacramento, is that right? A. That is right, sir.

Q. Every station has a freight agent?

A. That is right.

Q. I think you testified that you made periodic inspections of the corrals? A. I do.

Q. The Washington Corrals? A. I do.

Q. And everything that needed repair you reported to the Building and Bridge Department?

A. That is right.

Q. Now, if any of your men happened to see anything out of repair, would they report that to you? A. They would, sir.

Q. And you in turn would report that to the Bridge and Building foreman?

A. That is right.

Q. I think you testified you did not know at that time whether there were any chains or locks available or not, didn't you? A. That is right.

(Testimony of Sigmund A. Fisher.)

Q. In other words, had you had locks and chains out there?

A. We had them on there several times, [285] yes.

Q. And whether they were there that particular day or not, you have no knowledge?

A. I do not know, no.

The Court: Do you make any charge to the shipper or consignee for the use of the corrals either at the—strike that.

Do you make any charge to the shipper or consignee for the use of the corrals at the point of destination? A. No, we do not.

Q. As such? A. No, we do not.

Q. That is a part of the services furnished by the company the same as the car, the rolling stock and the road bed? A. That is correct.

Q. (By Mr. Wulff): Now, do you remember a make-shift wire fence in the vicinity of the corral?

A. Yes.

Q. Did you maintain that for cattle shipments that came in? A. No.

Q. Do you know how that fence got there?

A. No, I do not.

Q. In other words, you never gave any authorization to anybody to use it? A. I did not.

Q. Or anyone in your office, to your [286] knowledge? A. No.

Mr. Wulff: I think that is all the questions.

(Testimony of Sigmund A. Fisher.)

Redirect Examination

By Mr. Robertson:

Q. Mr. Fisher, you did know the fence was there on the property?

A. I saw the fenced area.

Q. And did you ever instruct any shippers of livestock not to use that area? A. No.

Q. Do you know whether any of your stockyard men instructed them not to use it?

A. I do not.

Q. But you knew the fence was there?

A. I saw it there, yes.

Q. Now, Mr. Fisher—counsel, will you refer to Page 6 of his deposition and stipulate from line 2 to line 27 that the questions were——

Mr. Wulff: That the questions were asked and the answers were given, is what you want?

Mr. Robertson: Yes.

Mr. Wulff: What lines?

Mr. Robertson: Line 2, Page 6, to Line 27, Page 6. Will you stipulate that I may read those answers and questions to the witness, counsel?

Mr. Wulff: What is that? [287]

Mr. Robertson: Will you stipulate that I may read those to the witness?

Mr. Wulff: Certainly. I don't have to stipulate.

Q. (By Mr. Robertson): Mr. Fisher, did you give the following answers to the following questions at your deposition:

(Testimony of Sigmund A. Fisher.)

“Q: Now, sir; by whom was the feeding and watering done?

“A. Well, if the shipper requests it, if he requests his own feeding and watering, he will do that himself.

“Q. And if he does not?

“A. Otherwise we will do it, we will perform the services.

“Q. In other words, unless he requests that he do the feeding and watering, you will do it for him? A. Yes.

“Q. And do you have employees who are located at those particular stockyards?

“A. None.

“Q. Can you tell me on or about December 17, 1954, who, if anyone, you had working at this particular stockyard, this corral, I should say?

“A. I don't know of anyone working over there at the time.

“Q. Well, normally when animals are taken care [288] of over there, who takes care of them for the Southern Pacific Company?

“A. Our stock man takes care of them.

“Q. And what is his name?

“A. Anthony Perine.

“Q. Mr. Perine, sitting here?

“A. Yes.

“Q. And is there any other person who works in that particular yard?”

(Testimony of Sigmund A. Fisher.)

Mr. Wulff: Your Honor, I object to that as not inconsistent. I don't know the purpose of it. There is no surprise involved here. He testified to the same thing.

Mr. Robertson: No, he didn't, counsel.

"Q. Is there any other person who works in that particular yard or who has worked there in that particular yard in the last year?

"A. You mean assisting Perine, or what?

"Q. Either working with him or assisting.

"A. Yes. We have another man.

"Q. State his name, please.

"A. Robert Duke.

"Q. Is Mr. Duke still employed by the Southern Pacific Company?

"A. Yes."

You gave those answers to those questions? [289]

A. Yes.

The Court: What part of that do you contend is impeaching, Mr. Robertson?

Mr. Robertson: Well, he stated, your Honor, as I gathered from his testimony, that the S.P. never is required to feed the animals under these tariffs, that the owner is required to do so, and yet his testimony is that the Southern Pacific does so unless requested by the owner to do so.

Mr. Wulff: Well, let's clarify that up. May I take him back on it or do you wish to have him?

Mr. Robertson: Well, I am still examining Mr. Fisher.

(Testimony of Sigmund A. Fisher.)

Mr. Wulff: Very well.

Q. (By Mr. Robertson): You stated that at certain times there were locks over there on the corral that you had seen? A. Yes.

Q. And who would have the keys to those locks?

A. The stockmen, either Perine or Duke, had the keys.

Q. In order to open the corrals, if the owner wanted to feed them, he would have to get the key from one of those men? A. Yes.

Q. Now, on the bill of lading or on the waybill there are charges indicated for feeding at one station and the rest is blank. That is correct, isn't it?

A. That is right.

Q. You don't know of your own personal knowledge who fed the [290] animals at those various stops, do you?

A. No, I don't know who fed the animals, no.

Q. And do you know of your own knowledge whether Mr. Coon accompanied these animals on the trip? A. I do not know that, sir.

Q. Can you tell from the documents whether or not anyone accompanied the animals? Wouldn't it be on the waybill if they were accompanied or not accompanied?

A. That would show on the waybill.

Q. Would you look and tell me if anyone accompanied the animals?

A. According to the waybill there was no one accompanied. It would show on the waybill whether or not there was a man in charge.

(Testimony of Sigmund A. Fisher.)

Q. According to the waybill no one accompanied the animals?

A. According to the waybill, according to the contract, there was no one signed to be in charge.

Q. If someone does sign to go with the animals, they have to sign a release to the railroad of certain liability, do they not?

A. They sign on the reverse side of this contract.

Q. And it is not signed?

A. No, it is not signed.

Q. Now, Mr. Fisher, you say that your responsibility or that of your company is to see that these charges are collected, is [291] that correct?

A. That is correct.

Q. Isn't it a fact that your company has a lien on the animals until the charges are paid? You can hold them and refuse delivery until they are paid?

A. We can hold them, yes.

Q. And I believe you testified previously that no receipt was signed by Mr. Coon for those animals at Sacramento? A. Yes.

Q. Would any of these documents show when payment was made for the shipment?

A. These documents would not.

Q. Do you have any other documents other than these relating to this particular shipment?

A. No.

Q. Actually these documents show that the shipper of these horses and mules was a person by the name of Charles Owens from Texarkana, is that correct?

(Testimony of Sigmund A. Fisher.)

A. Charles Owens, Owens Brothers Stockyards.

Q. They were the shippers?

A. According to the waybill, yes.

Q. And then when animals or freight are ultimately delivered, the company secures a receipt for delivery of them, is that correct?

A. Yes, we do. [292]

Mr. Robertson: That is all, your Honor.

Recross-Examination

By Mr. Wulff:

Q. When a shipment of livestock arrives in Sacramento as its point of destination, what is the first thing your office does relative to that shipment? Do they notify the consignee?

A. We notify the consignee that the stock is in town.

Q. Now, do you feed or water those stock under any circumstances, and if so, what are the circumstances under which you would feed and water?

A. Shipments that are billed to Sacramento we do not feed or water them.

Q. What would happen if the consignee failed to do it or refused to do it?

A. Then it is our obligation to feed them and water them.

Q. How about unloading a shipment that arrives in Sacramento as point of destination after you advise the consignee?

A. The consignee will unload his own stock.

(Testimony of Sigmund A. Fisher.)

Q. And if he refuses to do it, what happens then, in default of that, rather?

A. Then we would have to unload them.

Q. And I assume the 36-hour or 28-hour law requires that? A. Yes, that is right.

Q. In this instance, do you know of any request by Mr. Coon for you to unload or feed or do anything like that or did he [293] ask any permission himself to feed or water?

A. Well, he has indicated on previous occasions that he wanted to feed and water his own animals in Sacramento.

Q. In other words, you had an understanding of that?

A. We had an understanding with him, yes.

Q. Now, you said you didn't know who fed or watered the animals at these stops where it is shown on the waybill that there are no charges listed. That is correct, is it not? A. That is right.

Q. You know that the railroad did not do that?

Mr. Robertson: Well, I object to that. He said he doesn't know who did.

Mr. Wulff: Yes, he did. He testified that if the railroad did, the charges would be inserted in there, did you not?

A. They would be inserted on the waybill.

The Court: Well, I am going to sustain an objection. I don't think it is material to this case.

Q. (By Mr. Wulff): Now, you spoke about you had a lien for collection of freight. Now, do you also have the right to extend credit to a consignee?

(Testimony of Sigmund A. Fisher.)

A. I have, yes.

Mr. Wulff: That is all.

Mr. Robertson: That is all.

The Court: That is all.

Mr. Robertson: I would like to call Mr. [294] Pekema.

Mr. Wulff: If your Honor please, can we take that one page out of that big book? Did you introduce that or not?

The Witness: They have it there.

Mr. Wulff: Counsel, please, what about this big book? There is only one sheet involved there, and the witness has testified——

Mr. Robertson: I don't want this big book.

Mr. Wulff: There, you may take that.

The Court: There is nothing in that that was introduced.

Mr. Robertson: I didn't offer it, your Honor.

The Court: That is what I said, there is nothing in this book here that was offered in evidence.

The Witness: No. They have the tariff over there.

The Court: It was page 13 of that other book. Let the clerk have that so he can mark it. Page 13b of the tariff, Defendants' Exhibit A.

Mr. Wulff: You can take that book and go back to the office.

(Here followed the testimony of Mervin Pekema, and Percy Marcyes, which testimony is omitted from this transcript.)

The Court: We will take the morning recess at this time.

(Recess.) [295]

Mr. Miller: Your Honor, we are going to ask at this time that pages 12a and 13 of the tariff be admitted into evidence.

Mr. Wulff: If your Honor please, there is no application to this territory. They appear on their face to be applicable only to Arizona and Utah, intra-cross-state traffic in that instance, and the other instance, they apply only to Nevada and Oregon intrastate traffic. They are not tariffs in which these shipments went through at all, and they are not tariffs for Sacramento.

Mr. Miller: We feel they should be admitted, your Honor, because they at least contain statements as to the control of the livestock by Southern Pacific. We feel that it shows a right to control. Now, if they——

The Court: Now, wait a minute. Do you concede that those tariffs are only to the territory that Mr. Wulff has indicated? I haven't looked at them.

Mr. Miller: They would indicate on their face that they do not apply to this particular area. However, they contain provisions with regard to the control of livestock, which indicate a right to control of Southern Pacific of the livestock.

The Court: We have got two problems here, number one, we are concerned with a specific shipment here, and number two, as the record now stands, the Southern Pacific never had control of

these animals outside of the State of California, and only partially in the State of California. I don't see how these documents would be helpful to me if you concede they are [296] applicable only to the territory indicated by Mr. Wulff.

Mr. Miller: I concede that they state on their face that they are applicable to those territories. I think we are involved with actually two problems here, one of which is what the S.P. may say is duty, and the other question is what duty they actually have to the general public, and——

The Court: Well, that is either going to have to be contractual or statutory, and by statutory I am including any rules, regulations or tariffs that are laid down pursuant to statute. For instance, the law of the State of Arizona might be thus and so for every shipment that every railroad has through there, but I cannot see by what stretch of the imagination it could have any bearing upon this particular case.

These tariffs that are on file here are not there by the choice of the Southern Pacific Company, they are required to be there by law, and the Interstate Commerce Commission has certain very definite rules and regulations that they lay down.

Mr. Miller: Your Honor, I don't believe that these are rules and regulations of the Interstate Commerce Commission, these are regulations of the Southern Pacific Railroad.

Mr. Wulff: No, your Honor.

The Court: They are required to be filed under

the rules and regulations of the Interstate Commerce Commission. [297]

Mr. Wulff: He doesn't know how to read them, I am afraid. They are tariffs. If your Honor please, may I just show what I have in mind here: Here is paragraph 4 of the bill-of-lading: "The shipper at his own risk and expense shall load and unload livestock in and out of cars except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision."

Now, there are all kinds of tariff provisions. He goes here to Nevada and Oregon and picks out a tariff provision. Now, we come in with the one in—with the one in Sacramento.

The Court: Mr. Wulff, the only thing I can say to you is I'm inclined to favor your side, so I suggest——

Mr. Wulff: So don't let me talk myself out of it.

Mr. Miller: I would like the entire tariff marked for identification, your Honor.

The Court: All right, I will mark the entire tariff as—but once again I may say this, these are official documents which are on file and of which I can take judicial notice, but for the purposes of the record I will mark it as Plaintiff's Exhibit 29 for identification.

Mr. Wulff: My objection is good?

The Court: I am not admitting it in evidence, I am only marking it for identification so they may have their record protected in regard to it if they so desire.

(The documents referred to were marked as Plaintiff's Exhibit 29 for identification.) [298]

Mr. Robertson: May it please the Court, may the witness Pekema and the witness Marcyes be excused at this time?

The Court: Unless there is objection, they will be excused.

Mr. Wulff: No objection.

Mr. Robertson: Now, your Honor, the plaintiff is prepared to rest the case in chief, subject to two things: First, subject to that ownership and control of the land stipulation which we have to discuss with Mr. Wulff, and I presume there will be no objection to that, and in the event we can't arrive at a stipulation, we will be allowed to reopen the case in chief as to that point.

Mr. Wulff: No objection, your Honor.

Mr. Robertson: Secondly, your Honor, as a statement of the record and so as not be concerned with any contention in the future in regard to Mr. Coon and his assistant Tex, the record will show on the motion to remand and so forth by affidavits and the like, that demand has been made from the defendant to ascertain their whereabouts, if they knew, and the other activities that have taken place on our part to locate those two persons, and we have been unable to locate them. We have understood from Mr. Courtney that they have moved to Arkansas, but no one knows where.

Mr. Wulff: That is not part of this case, your Honor. I [299] don't know anything about it.

The Court: The only purpose, I suppose, of the statement is to show that there is no wilful suppression of evidence.

Mr. Robertson: Yes, your Honor.

The Court: It doesn't tend to prove anything except that the plaintiff could not be bound upon the basis that there was a wilful suppression of evidence.

Mr. Robertson: Yes, your Honor.

Mr. Wulff: This case has been moved for six months.

Mr. Robertson: Well, the only point I wish to make is that the record will indicate in this case that a diligent search has been made for those parties and we have been unable to locate them.

Subject to the possession or title or ownership of the land and subject to Mr. Miller's stipulation as to distances, the plaintiff will now rest his case.

The Court: Don't you have those distances worked out yet?

Mr. Wulff: If your Honor please, they don't mean a thing to me. If the Court wishes me to stipulate, I will stipulate. I don't think it makes any difference whether it is one mile or one mile and a tenth. I don't know whether their speedometer is accurate, I know nothing about it.

The Court: Well, will you stipulate that these readings have been taken off a speedometer and have been presented to the Court here? [300]

Mr. Wulff: Yes, if they will be of any help to the Court, I will be happy to.

The Court: All right. I just want to get it.

Mr. Wulff: Your Honor, please, I would like to make a motion.

The Court: Well, let me get this out of the way here. Is there any objection to simply admitting this document here as being a document prepared by Mr. Miller from his observations, and you are not bound by it any more than that is what is on the paper here?

Mr. Wulff: Certainly.

The Court: All right. Let it be marked Plaintiff's Exhibit 30 in this matter at this time, so we will have that out of the way.

(The document referred to was marked Plaintiff's Exhibit No. 30 for identification.)

Mr. Wulff: If your Honor please, I would like to make a motion for non-suit at this time, reserving our right of course, for a directed verdict, on the ground that the evidence shows without any conflict that the cattle arrived at their destination—I mean, the livestock arrived at their destination at 10:00 o'clock on the 16th of December, and immediately were unloaded by the consignee, consignee assumed full control and custody of the cattle, and let them outside the corral.

The Court: You are bound to have cattle involved here, [301] Mr. Wulff.

Mr. Wulff: I am sorry. Can I change my cows for horses again?

The Court: You may have the record show when you say "cattle" you mean horses and mules.

Mr. Wulff: It will be very helpful, sir.

And the record shows that the horses and mules were outside the corrals at various times on the day of the 17th, and they got loose and Mr. Coon was rapidly in pursuit of them, and during that pursuit the accident occurred.

In other words, there is no custody or control shown in the railroad at all. In other words, the complaint charges we are the owners and in possession and custody of the cattle, and we were negligent in that particular, and negligent in our custody, control and possession.

There is no proof that we were. They arrived at their destination and the diversion order did not come in again until after the accident, in other words, 24 hours later, practically, and under those circumstances there is no liability and no duty owed to this party at all, nor is there shown any breach of duty.

The Court: Well, Mr. Wulff, on what basis do you say there is no duty on the part of the Southern Pacific for the care——

Mr. Wulff: Because our contract was one of carriage. They arrived at the destination. Our contract was completed. [302] They have the right to divert, but until they divert, the contract of carriage is completed.

The Court: When you are speaking of the contract of carriage, what are you referring to?

Mr. Wulff: I am referring to the livestock contract. That is our only duty, transport to Sacramento. That we did.

The Court: Well, now, that is Plaintiff's No. 19, then?

Mr. Wulff: I don't recall the number.

The Court: That is the one that is entitled "Uniform Livestock Contract."

Mr. Wulff: That is correct.

The Court: And is there anything in these waybills here that charges you or allows you to escape from liability?

Mr. Wulff: We have no escape because we completed our contract.

The Court: No. I mean in these waybills is there anything that charges you with responsibility or allows you to—when I say escape, I am speaking in terms of legal, not running out the door.

Mr. Wulff: That is right. Our contract provides, if your Honor please, that the livestock must be unloaded by the consignee. In other words, it is his risk. That is the loading and unloading.

The Court: What about the waybills? Is there anything in those waybills—— [303]

Mr. Wulff: Not a thing. The waybills have "Sacramento" scratched out and "Santa Rosa" inserted, and that was done pursuant to the diversion order. That was done on the 18th pursuant to the diversion order.

Now, the diversion order was introduced in evidence by the plaintiff. It shows they were delivered from Sacramento to Santa Rosa on the 18th. They were not our cattle at all, we had no custody or no control at all, and they would not be our cattle again

until the diversion order was signed and the consignee put them back into the cars.

The Court: Well, now, let me ask you something else here: I notice in looking at this diversion here, that "Sacramento" has been Xed out with red typewriter and with the same typewriter is written down below "Shell," I guess it is, S-h-e-l-l, "N.W." —I assume that is Northwestern Pacific?

Mr. Wulff: That is right. That is where that station is located on that railroad.

The Court: I understand that, but——

Mr. Wulff: That was done pursuant to the diversion order on the 18th, the day after the accident. Time is of importance, your Honor.

If your Honor please, I have a doctor in attendance here who has time complications. Could I put the doctor on and argue this motion later, and do it without——

The Court: Do you think you can finish with him before [304] lunch time?

Mr. Wulff: Yes, I hope to.

The Court: Well, all right.

Mr. Wulff: Is that agreeable, counsel?

Mr. Robertson: Yes. Of course, your Honor, understands I do not subscribe to any of the argument made and I will answer it at the appropriate time.

Mr. Wulff: Yes, that is agreeable.

The Court: All right.

(Here follows the testimony of Doctor Richard E. Kendrick, which testimony is omitted from this transcript.)

Mr. Wulff: Do you want to hear us on the motion?

The Court: Did you get that matter of the land straightened out?

Mr. Wulff: Yes, we did. We own to the street line, but we are not clear, there is no survey there, whether the grass runs up into the street, but as far as title to the property is concerned, we own to the street.

Mr. Robertson: That includes that area in the photograph.

Mr. Wulff: It doesn't include it all. That runs into the street, too.

Mr. Robertson: Up to the street.

Mr. Wulff: Into the street; because the street is narrow and there is grass in between. In other words, you have got an 80-foot right-of-way [305] there.

The Court: What you said, Mr. Wulff, was that you own up to the street?

Mr. Wulff: Up to the dedicated street. The dedicated street is partially grass, and that area where the horses were was in the street as well as on our property.

The Court: Does anyone know how wide that street is? Is it 40, 50 or 60?

Mr. Wulff: About 80 feet, I think it is. It appears to me to be 80 feet. I haven't had that checked; that is just my judgment.

The Court: They have awful wide streets over in West Sarcamento.

Mr. Wulff: That is right. My recollection is that

Broderick and Washington were laid out on the same basis as Sacramento is.

Mr. Robertson: My estimate would be about 50 feet. We can check it.

The Court: Well, it doesn't make any difference. The only thing we are concerned with here is that that property between the railroad right-of-way and those corrals is the property of the Southern Pacific.

Mr. Wulff: It is the street right-of-way, not the track; it is a street. The track is on the other side.

The Court: There is a track on one side up to the—the public thoroughfare, the edge of the public thoroughfare, does [306] belong to the Southern Pacific.

Mr. Wulff: Well, let's put it this way: That the northern edge is a dedicated street, and to the railroad track is clearly S.P. property.

The Court: That is putting it in reverse of what I said, but it is good enough. Does that satisfy you?

Mr. Robertson: Yes, your Honor.

The Court: All right.

Mr. Wulff: May I proceed, your Honor?

The question we have here is who permitted these cattle to stray.

The evidence does not show that the cattle were in the possession of the Southern Pacific Company, but it shows to the contrary that they were in the exclusive possession of Mr. Coon.

Now, the relationship between Coon and the Southern Pacific is evidenced by a written contract.

Now, that contract is that the railroad agreed to transport—let me get the language here:

“Carrier agrees to carry to its usual place of delivery and destination”—in other words to a certain cargo of livestock consigned to H. L. Coon and with destination Sacramento, California.

Now, that is in the first “Now, therefore” in the contract.

Now, the only contract we had was to transport that from [307] one place to another.

Now, this arrived at its place of destination. The evidence is that it was unloaded by Coon and Coon was out on the morning of the 17th and had driven the cattle from the corral—the horses, rather, from the corral to outside the corral, because, as their witness stated, feeding was easier, although they could have fed them from the troughs and the racks within the corral.

Now, that was the condition at the time of the accident.

Now, as a matter of railroading, a shipment that has reached its destination can be diverted within 20 days thereafter. Now, by diverting it under the tariffs, they receive a different rate, they receive a through rate, instead of the local rate for transportation. In other words, they are given a privilege of hauling it at a cheaper rate, but for all intents and purposes it is a new shipment.

Why? Because under the original contract, it has been completed.

Two days elapse before he elects to what? Exer-

cise his right to get a cheaper rate. When he exercises this right, the accident has already occurred.

Now, it is in his care, however you look at it. Take the tariffs; if it is in transit, has not reached its destination, the tariff says the custody and possession of the livestock while feeding, watering, resting, sorting or consolidation, [308] shall be that of the owner and not the carrier.

Now, if the S.P. didn't know, which it didn't know, that they were going to be diverted before the cattle were unloaded, then the cattle were unloaded for feeding, watering, resting, sorting and consolidation, and the tariff says that possession and custody shall be that of the owner and not of the carrier.

Now, under what *hocus pocus*, let's put it that way, can they say that the cattle were under the custody and possession of the railroad?

If your Honor please, this is identical, in my opinion, to a rather recent case in California, *Rutherford v. Reilly*, 104 Cal. App. 2.

The Court: *Rutherford* versus what?

Mr. Wulff: *Reilly*.

The Court: How do you spell the last name?

Mr. Wulff: R-e-i-l-l-y. Now, my girl left off the page citation of it, but it is 223 Pacific 2d, page 34.

The Court: I have that in the library, so you don't need to bother.

Mr. Wulff: In that case, the question involved was whether the operator of a boarding stable for horses was liable for injuries caused by a horse which escaped from a box stall while its owner was

in the act of placing a halter on it preparatory to exercising the horse.

Now, the defendant riding academy—in other words, this [309] is a factual situation so I will have to give the facts. Ours also is a factual situation, identical to this.

The defendant riding academy was engaged in boarding horses and the stable was adjacent to a riding range. The owner of the horse boarded the horse at these stables. The academy kept the horse loose in a box stall access to which was through a sliding door. When the defendant Reilly, the owner of the horse, opened the door, before he had an opportunity to place a halter on the animal, it bolted out through the open door, through a gate into the riding stables. The defendant Reilly and others attempted to head the horse from escaping, and their efforts excited the horse and it escaped to the highway, and on the highway the horse collided with an automobile driven by the plaintiff, injuring him.

The trial court, sitting without a jury, found that the possession of the horse was controlled by the two defendants, and immediately prior to the accident the defendants permitted the aforesaid horse to escape from the stables and later permitted it to stray upon the highway unaccompanied by a person in charge and control, and found judgment against both defendants pursuant to Section 423 of the Agricultural Code.

The stable operator appealed. The court held that there was no evidence that the stable operator was in possession of the horse, and in that regard, on

Page 630 of the California decision the Court [310] states:

“On the facts narrated, it is plain that Reilly was entitled to and was in exclusive possession of the horse from the moment he opened the stable door and that the possession of the academy as bailee thereupon ceased. The Court’s finding to the contrary is not supported by the evidence. The horse escaped from the stall through the act of Reilly and through no act of the academy, negligent or otherwise.”

Now, here the relationship of the Southern Pacific Company as a bailee ceased when this shipment arrived at the West Sacramento corrals on the 16th of December, and they were removed by the consignee. Thereafter the consignee, the owner, took charge, and it was through his acts, whatever they may be that they escaped. Just like it was the act of the owner of that horse. And therefore, as a matter of law, there is no proof there that the horse escaped from that area or corral or whatnot, wherever he may have escaped from, through any act of the Southern Pacific Company. Nor was the horse in the possession of the Southern Pacific Company. Our contract was completed. We were not rehired and did not become a bailee again until 4:30 on the 18th day of December.

Now, the liability they premise this on is based upon possession, custody and ownership. That is the complaint. Now, there they have an utter failure of proof. Under Section 423, [311] if your Honor

please, *res ipso loquitur*, is not application to this case, especially by statute.

Any questions, your Honor?

The Court: Not at this time.

All right, Mr. Robertson, what do you have to say about the matter?

Mr. Robertson: Mr. Wulff's argument is fine except, your Honor, it relates solely as between the rights, duties and obligations existing between the Southern Pacific Railway and one Charles Owens. The evidence conclusively establishes that the contract of carriage between Charles Owens and the Southern Pacific Company, period.

Now, I will invite your Honor's attention, and I believe you might have it up on the desk, to Plaintiff's Exhibits 17 and 18, which are the waybills. The waybills conclusively demonstrate that the shipment was between Texarkana, Texas, and Santa Rosa, California. That is the waybills.

The evidence is that those are the customary and only documents going along with a shipment of livestock in this case.

I think your Honor further may look at Plaintiff's Exhibit 11 in evidence, which, according to the statements of the defense, was a stockbook of the company kept in the ordinary course of business and which contained a statement by the assistant corral yard master stating that the horses [312] escaped from the corrals.

There is a duty between the railroad company and the shipper, in this case Charles Owens, which is one duty, and there is a duty of a common carrier

for hire carrying livestock and the general public, which is another duty.

It is true that Charles Owens and the Southern Pacific Company could contract whereby Charles Owens agreed that he would assume the responsibility of feeding his animals, and the only liabilities thereby extinguished would be the liability between the Southern Pacific Company and Charles Owens in the event that any of Charles Owens' horses died for failure to be fed or cared for, he having agreed with the consignee that he would feed them when they were in Sacramento. So that if a horse died here, or any of them became ill because of improper care, it could be argued between Southern Pacific and Mr. Owens that Mr. Owens gave up his right to require the company to feed.

However, the duty existing between Southern Pacific Company as a common carrier for hire engaged in the business of hauling livestock and bringing livestock into a highly populated area, as between that company and the general public an altogether different duty arises, and that is the duty to exercise ordinary care to see that those animals that they bring into the city limits or in Broderick, and which are unloaded here and put in their corrals, are cared for in such [313] a manner that the same shall not be allowed to escape and do injury to the public.

Now, if it please the Court, I am fully conversant with the Reilly case, and that citation, by the way, your Honor, is 124 Cal. App. 2d 629. In the Reilly

case there was an altogether different situation, both factually and as a matter of law.

In the Reilly case it was held that Reilly, the owner of the horse, and the stable owner, the Sleepy Hollow Stable, had a joint duty of the care of that horse to the general public so long as they both had it in their possession and control, but the court held that when Reilly came in, opened the door and took it out, then the duty became his.

Now, in that case, your Honor, it would be similar to a garage bailment, where an owner takes his car into a garage. It is true that while that car is in the garage, the garage owner would have liability, but when you go in and get your car and drive it out on the street, obviously they would have no further liability.

Now, on the other hand, if it please the Court——

The Court: How do you distinguish that from the situation existing in this case?

Mr. Robertson: In this case the records of the Southern Pacific Company themselves made in the ordinary course of business prove that the horses escaped from the corrals, and [314] the evidence shows, for the purposes of non-suit——

The Court: Well, now, wait a minute. Let's stop right there. In the Reilly case, the horse escaped from the stable of the Sleepy Hollow people, didn't it?

Mr. Roberston: No, your Honor. In the Reilly case, the owner came and opened a door and took the horse out and it escaped from him at that time.

The Court: Yes, but it is right there at the stable.

Mr. Robertson: Yes, but the owner himself opened up the door. Now, in this case, your Honor——

The Court: Well, Coon opened the door in this case here and let the horses and mules out of the corral.

Mr. Robertson: No, there is no evidence to that effect, your Honor.

The Court: Well, you can't have your cake and eat it, too, here. This very document that you are referring to says that: "Unloaded by owner, counted by me, not called by 12th Street, happened to see stock pass."

Mr. Robertson: No, on the right-hand side, your Honor.

The Court: I understand, but I can't shut my eyes and see only what is on the right-hand side; I must see everything.

Mr. Robertson: Yes. Your Honor asked me how does this case differ from the Reilly case.

The Court: Yes.

Mr. Robertson: All right. Now, in both of these cases [315] we know that the animals were put into an enclosure.

The Court: They were legally in what is tantamount to a bailment.

Mr. Robertson: Yes.

The Court: In both instances. In one instance it was the Sleepy Hollow Riding Academy, or whatever it was, I have forgotten the name of it; and in

this one here it started out as the Texas Pacific and then it became the Atchison Topeka and Santa Fe and then eventually the Southern Pacific.

Mr. Roberston: Yes.

The Court: All right. Now, go on from there.

Mr. Robertson: Going from there, your Honor, in the Reilly case, the horse was inside the stable and in the box corral with the door closed. Then the owner came and opened the door and took the horse out and it got away.

The Court: In this case here, Coon came and opened the door on the cars and took the animals off.

Mr. Robertson: No, they were put in the corrals, your Honor. The evidence shows that these horses were put in the corrals, you see.

The Court: By Coon, the same as Reilly put the horse in the box stall in that case.

Mr. Robertson: There is no evidence in the Reilly case that Reilly put the horse in. The ruling in that case, your Honor, was that they both had control over the animals as long [316] as they were in the corrals, but when the owner came and took the horse out of the corral, then he became responsible.

In this case, your Honor, the evidence is that they were put in the wooden corral, and the next morning they were taken out of the wooden corrals and fed out in the other enclosed area.

The Court: By Reilly.

Mr. Robertson: By Coon.

The Court: I know, but I am interpolating the

name "Reilly" in there because Reilly was the one who took the horse out in the Reilly case.

Mr. Robertson: The evidence is that this other outside enclosed area was enclosed by a fence and that the S.P. employee came in the morning and saw them there being fed in this wire fence enclosure, came again at a quarter to 4:00 in the evening and saw them being fed in this wire enclosure, and subsequently that the assistant, Mr. Duke, the next day filed a report that the horses escaped from the corrals and ran down the Yolo Freeway and two killed by autos.

Now, that is evidence, conclusive evidence, made in the ordinary course of business, these horses escaped from the corrals, and this event, we don't know whether he spoke of being put back in the wooden corrals and escaping from there, or whether they escaped from the wire enclosure.

We do know from the testimony of Mr. Courtney and the [317] police officer that the wire enclosures were not adequate and that horses could escape from them. We do know from the testimony of S.P. officials that they knew that that corral or wire enclosure was maintained on their property.

Now, one further thing I would like to point out to your Honor, the duty of the railroad in transporting livestock for hire under the Agricultural Code provides that such common carrier maintain adequate facilities for the purpose of doing that. Section 423 provides that—correction, 422 provides that "It is unlawful for any officer, agent or conductor of any railroad in this State, who, in carry-

ing and transporting horses, cattle, sheep, swine, or other animals, in cars, to confine the same in cars for a longer period than 36 consecutive hours without unloading for rest, water and feeding into properly equipped pens for a period of less than five consecutive hours.

“In estimating such time of confinement, the period during which animals have been confined without rest on connecting roads from which they are received must be included. In case the owner or person in charge of such animals refuses or neglects to pay for the care and feed of the animals so rested, the company or person operating such railroad may charge the expenses thereof to the owner or consignee and retain a lien upon the animals therefore until the same is paid.”

Now, the United States Code provides practically the same [318] thing, your Honor.

“Properly equipped corrals.” Now, the evidence in this case discloses that the shipment was made in two railroad cars from Texarkana, Texas, and ultimately ended up in Santa Rosa, California, on the same cars. That when the animals were taken off of the cars in Sacramento, no receipt for delivery of said animals was given by the consignee or the owner to the railroad, but that upon arriving at their destination in Santa Rosa, such a receipt was given by the railroad, which is a part of either Plaintiff’s Exhibit 17 or Plaintiff’s Exhibit 18, I don’t have my photostat number, a part of the waybills.

The waybills also demonstrate periodic——

The Court: Let's get that straightened out here. You show me where that appears.

Mr. Robertson: That is on the back of this certificate right there, your Honor.

The Court: Are you referring to the document that says "Northwestern Pacific Railroad Company Certificate, Santa Rosa, California, 12-22-54"?

Mr. Robertson: Yes, your Honor.

The Court: Well, let's read that.

"I hereby certify that all of the horses, mules, burros or asses received at Santa Rosa, California, in Cars AT27608, AT29117, shipped from Texarkana, Texas [319] on 12-9-54, were purchased by me from Has," it says; I assume that should be Chas.—"Owens, and were slaughtered at Santa Rosa, California, within 30 days after date of arrival. H. L. Coon."

Is it your position that that is a receipt?

Mr. Robertson: It is my contention that that is the only document that has been produced, that is a receipt for the animals. The car numbers which they were shipped in are noted there, and it is certified that they arrived and were purchased by Coon from Owens on the 22nd of December, 1954, and slaughtered in Santa Rosa.

It is my contention that obviously the railroad, being the final connecting line, is certainly not going to deliver 55 or 57 head of horses and mules without obtaining some receipt for the delivery thereof. It is my conception of this document that this constitutes a receipt.

That becomes, I think, a question for your Honor's legal interpretation.

Now, if it please the Court, here is one very urgent point that I think your Honor must go into in this matter, and it really becomes the crux of the case: the defendants' argument is to the effect that by regulations promulgated by the railroad and filed with the Interstate Commerce Commission and by contractual agreement with the owner or shipper, that they thereby excuse themselves from all liability to the public, [320] that they can bring into Sacramento—this is the effect of their argument—that they can bring in 56 or 57 head of horses and mules to Sacramento and from there on they have absolutely no duty of care to anybody, although they are in the business of transporting these animals and are maintaining feed and watering corrals. That they can open the door and lead those animals out and that is the end of their liability.

That, your Honor, would be an abrogation, not only of the Agricultural Code section requiring that they maintain adequate pens—and obviously the construction of that statute would be “adequate pens not only for the protection and care of the animals, but for the preservation of the public and public property.”

Now, I would like to cite to your Honor several cases: *Merring v. Southern Pacific Company*, 161 California 297, which provides that while an owner may agree to accompany livestock, this does not relieve the railroad from providing adequate feed,

water and properly equipped pens for their rest and feeding.

Most of these cases which your Honor will come across are cases involving suits by the owner against a railway for damages done to the animals, for the alleged neglect of the railway and unfortunately there is not much authority involving escape from railway corrals by which the public is injured, it again being the average case arising when an [321] animal is killed or has died.

Yet there are authorities for the proposition, and I cite to your Honor *Texas Railway Company v. Bigham*, 38 *Southwestern* 162, which provides that the pens must be constructed and maintained in such a state of efficiency as is reasonably calculated to prevent the animals escaping therefrom. The failure to fulfill this duty and disregard will render the carrier liable for loss or injury sustained thereby.

Now, following that case up, in *Brook and Olson v. Paine*, 181 *Northwestern* 803, it says that this duty—that is, to maintain adequate pens and so forth—is imposed by law regardless of the fact that the shipper retains control and management of the stock until lading is commenced.

Now, our position is this, your Honor—and by the way, Mr. Miller has some cases concerning the fact that if a railway allows someone else to operate one of its switch engines and that switch engine is operated negligently so that third parties are injured, the law holds the railroad liable for allowing its property to be used negligently to the detriment of the public.

The Court: I don't think you need to give me any authorities on that. That is almost a Hornbrook. If I put somebody in charge of my property and they go out here and injure somebody, I am liable for it.

Mr. Robertson: Here is a conclusion we have to draw, your [322] Honor. We know that the law provides that when a railroad undertakes the job of transporting livestock in cars for hire, they are under government regulations and statutes and state statutes that require them to stop, feed and rest the animals at periodic intervals, and it is required obviously in the discharge of the general duty to exercise ordinary care for the public, to exercise ordinary care to see that this livestock is not allowed to get out and injure the public.

Now, a typical example would be, in the Chicago stockyards; I don't believe anyone can intelligently argue that a railroad that brings stock into that stockyard, its duty is immediately discharged in putting the livestock in its pens by turning over the right to feed that livestock to the public. If it maintains inadequate pens and is on notice that the owner has taken that livestock out and is feeding it in an open area in another enclosure which is inadequate, can it be said that they, by having the owner sign some waiver as to feeding, that that relieves them to third parties?

The Court: Let me ask you a question now, Mr. Robertson: What could the Southern Pacific have done about this matter if they had objected to what Mr. Coon was doing?

Mr. Robertson: They could have instructed Mr. Coon to place the mules back in the corrals——

The Court: Suppose he said, “You go jump in the lake; these are my mules”—— [323]

Mr. Robertson: Mr. Coons was on Southern Pacific property, using Southern Pacific Company facilities, they could have ordered him off the property, placed his mules in the pens and had a lien on them until they were paid, and until such time as Mr. Coon made arrangements to have them physically removed from the premises.

The Court: Would they not have subjected themselves to a suit for conversion the moment they did that?

Mr. Robertson: No, I think as a bailee or as a carrier for hire, transporting stock, and particularly in this case in transit, that they have the right to exercise that degree of control over the stock since they have the custody, to protect the public.

The Court: That is the very crux of the thing there. Do you have any authority that says that they have that right to tell the owner what he may or may not do with his animals, and if so, how far can they go? Is that confined to the yard, or can they follow him out to the ranch wherever he is going to be and tell him, “You have got to do this or you have got to do that with these animals”?

Mr. Robertson: I have read all of the fine print on the back of that uniform livestock agreement—I cannot at this moment point out to your Honor the exact place—but there is a provision in the livestock agreement that gives the railroad control over

the animals and over anyone who accompanies [324] these animals to feed them. It reserves the right in the railroad to cause conduct of individuals going along to be such as to not expose the railroad. And also——

The Court: Isn't that the situation where they are in transit, which is what I am getting back to now? Doesn't your case stand or fall on whether or not there was actually a termination of the initial run here in Sacramento or whether or not there was actually a through run to Santa Rosa?

Mr. Robertson: No, your Honor, it does not.

The Court: Why not?

Mr. Robertson: Our case is strengthened by the finding of the Court that there was a through run. But let us assume for the purposes of argument that there was not a through run and it terminated here in Sacramento. You still have another provision of law whereby you have an owner maintaining a corral and bringing into his property animals. Having brought those animals into his property, his duty does not terminate as to the exercise of ordinary care until such time as those animals are physically removed from the property.

And again I say to your Honor——

The Court: Let's stop right there.

Mr. Robertson: All right.

The Court: Do you have any authority for that statement, that as long as these animals were on the Southern Pacific's property, even though the owner had taken the animals off the [325] car himself,

that the Southern Pacific was responsible? If you have something on that, I would like to have it.

Mr. Robertson: I wonder if Mr. Miller could argue that. I haven't read the case——

The Court: Certainly. All I want is to try to get some help on this.

Mr. Miller: Yes. I would like to cite to the Court the case of *Porter v. Thompson*, 74 Cal. App. 2d 474. That was a case in which the court had granted a new trial after judgment for the defendant, and the order granting the new trial was affirmed on appeal.

In this case the plaintiff—or rather, the defendant operated a cattle auctioneering yard where cattle were brought in.

The Court: I know that case, I think. That came from Modesto, didn't it?

Mr. Miller: I believe it did. your Honor.

The Court: That is where the cow jumped over the barrier and into the lap of a spectator at the auction yard that the defendant Thompson ran.

Mr. Miller: That is right, your Honor.

The Court: I didn't try it, but it was going on while I was there. Proceed.

Mr. Miller: And the Court there held that there was a serious question in that case as to the maintenance of proper [326] fences around the area in which the cattle were enclosed.

Now, the cow which escaped was not owned by the auctioneer.

The Court: As I remember, she was there in the arena being demonstrated and somebody frightened

the cow and she ran and jumped over the fence or barrier or whatever it was and landed in the lap of a spectator who was sitting there.

Mr. Miller: That is right, your Honor, and the Court held that it was the duty of the owner of the pen to provide a safe fence for the protection of the plaintiff.

Now, though it is true that the plaintiff——

The Court: I haven't read that case for a long time, but was there any differentiation made in that case between the fact that the person who was there was an invitee?

Mr. Miller: I was going to point out, your Honor, that in that case the person was an invitee.

Now, I would like to correlate that with what is a general rule with regard to railroads, and I would like to cite the Court to 75 Corpus Juris. Secundum on "Railroads," Sections 984 and 985.

The Court: 75 Corpus Juris. Secundum what?

Mr. Miller: Railroads, Sections 984 and 985.

The section stands for the principle, "As to persons on highways or private premises near its tracks, a railroad company owes the duty to use reasonable or ordinary care to avoid injuring [327] them."

Now, I would like to cite a case which I feel is fairly close in point. That is Clifford v. New York Central Railroad, 97 New York Supplement 954. There it was held that a railroad was liable for injuries caused by the throwing onto a highway of newspapers by an employee, not of the railroad, but

an employee of a news company, who was accustomed to taking its paper over the road.

On proof of the existence of the custom of throwing the newspapers off at that particular place where the injury occurred, and that the custom was known to the company.

Now, there the railroad company had the right to demand that the newspaper employee not throw these papers off of the train, and they acquiesced in the conduct of the newspaper employee in throwing those papers off the train, thereby approving the situation.

We have the same example here, where twice on the day of the accident and two hours before the accident, Mr. Coon was observed feeding the mules in an area outside the wooden corral and in the area surrounded by what the evidence clearly demonstrates is an inadequate fence surrounding the Southern Pacific property there.

I would also like to cite your Honor to a case involving general negligent permissive use of its property by a property owner. The case is—I can't pronounce the first name. I would like to spell it, it is P-s-c-h-o-m-y v. Brooks Market. [328]

Now, there are two citations for this, the second citation is not the important one. The one I think that—well, I will give them both. The first citation is 60 Cal. App. 2d 158.

Mr. Wulff: May I have that citation again?

Mr. Miller: 60 Cal. App. 2d 158, 140 Pacific 2d 431. The second citation for the case is 79 Cal. App. 2d 556, 180 Pacific 2d 933.

In the Pschomy case the owner of the property was sued. He had permitted a future occupant of his property, someone who had not yet entered upon a lease and had not yet entered on the property but who was going to open a store on this property, the owner permitted the prospective lessee to erect a sign upon the property and the sign was a small standing sign and it had an iron grille down at the bottom that came up and around like this (indicating), and a young lady was walking across the property and got her foot caught in the iron grill-work and fell and hurt herself and sued the owner of the property, and the case holds that the owner of the property is liable for the negligent permissive use of his property, that he had knowledge of the existence of this sign, the danger that was there, and failed to do anything to remedy that situation when it was within his power to do so.

Also cases holding the owner liable for negligent permissive conduct of a licensee: *Conrad v. Cloves*, 93 Indiana 476; [329] 47 American Reporter 388; *Smith v. Tennessee Railroad Association of St. Louis*, 160 Southwest 2d 476 at 479.

Also, as cases generally for the same proposition they may be found in 65 Corpus Juris. Secundum, Negligence, Section 92; 45 Corpus Juris., at page 879.

Mr. Robertson: Now, just to summarize for a moment, your Honor, there is in effect three legal relationships involved here, one legal relationship existing between the shipper and the Southern Pacific Company.

The Court: Which we are not concerned with.

Mr. Robertson: Which we are not concerned with. The other two relationships, which we are concerned with, the first and most important, I believe, is that this was a continuous transaction on the railroad from Texarkana to Santa Rosa, and they allowed these horses and mules to be placed upon their property and held there pending the routing back to Santa Rosa and that they are doing this as a common carrier for hire. In so doing that, they still have care, custody and control of these animals until such time as they reach their ultimate point of destination. That is the first legal relationship.

The second one is assuming for the purposes of argument—I don't agree with it; I think the evidence goes otherwise—that this is not a fact, can a common carrier for hire that is under duty to maintain adequate corrals and is under a duty [330] to unload these horses and put them off in their corrals awaiting delivery, can they escape all liability by merely saying that the moment the train arrives they have no further liability of any kind or character?

I think that having maintained these corrals on their property for hire and as a part and parcel of their carrier service, that they have a duty to exercise ordinary care as against the public at large to see that injury does not result.

And here the railroad was on express notice by their own employee within two hours of the accident that the animals were not being properly

maintained but were being held in an area in which the fence was not adequate to hold them, and the ultimate fact is that the animals did get out and onto the freeway a mile or so away and injury did result.

Mr. Wulff: Just a few words, if your Honor please.

As far as the Agricultural Code 422, there is no need to go into that. That section only deals with intrastate shipments, and we have here interstate shipments between Texas and California. So that is out of it entirely.

Now, they have overlooked in all their arguments—to take up their various three situations, they overlook the contract. Our connection with this livestock only comes through contract. The contract is to carry them from Texas to Sacramento.

Now, that we have established at the time this accident [331] occurred. Therefore, the relationship of bailee and bailor ceased when Coon took that shipment over. Now, we do have a lien to secure our cost of transportation, but the lien has no bearing in this case. We are dealing now, not with the parties to the lien at all; we are dealing with a member of the public operating a mile and a half away on a public highway.

The Court: Mr. Wulff, what about this situation, though: You have your pens out there as a part of the service that you provide and you allow Coon, in this case here, to go out and use your pens in such a fashion that——

Mr. Wulff: He used our corral only.

The Court: Well, he was using the territory out there, whatever you want to call it, in such a fashion that the animals were likely to escape and get out on the road.

Mr. Wulff: We don't know what happened. Now, let's take the situation that we have——

The Court: Well, we know they got out on the road.

Mr. Wulff: All right. In the first place their whole cause of action is based upon—let me read it —“That on or about the 17th day of December, said defendants, and each of them, owned or possessed and controlled and had in their sole care and custody such mules and horses in the immediate vicinity of Park Overpass on U. S. Highway No. 40, about one mile west of Sacramento, and was so negligent, careless and reckless in their said care, custody and control, ownership and maintenance, of said horses and mules as to allow said animals to stray.” Now that is the only act of negligence they charge, is negligence in [332] the control, custody, care, ownership and maintenance of the horses. A joint tort negligence being the same thing, the same thing is accused. Now the proof is that Coon had the exclusive control, management and ownership of the horses. They have failed to prove their cause of action. Now that is the only cause of action we are here defending. We have not any cause of action here relative to defective pens. Now, the evidence is from Mr. Courtney, their own witness, who testified that the corrals were in good shape.

The Court: That is the wooden corral.

Mr. Wulff: All right. Now there is no plea that the wire corral was supplied by us. The evidence is that one third of the enclosure was put in there by Mr. Coon himself.

Now an enclosure is not an enclosure unless it is all enclosed. One-third of the area enclosed was put in there by Coon himself.

The Court: I think it was one-third of one side.

Mr. Wulff: One-third of one side, and the answer is it is no enclosure unless it is all enclosed. You haven't got an enclosure unless you have got it enclosed, let's put it that way.

Furthermore, they have to prove, do they not, that the horses escaped as the proximate cause of some defect?

Now there is no proof of that, none whatever.

The Court: Do they necessarily have to prove a defect? In the negligence allegation—what was that wording there [333] again—"They were so negligent, careless and reckless in their said care, custody and control, ownership and maintenance of said horses and mules as to allow said animals to stray and come upon the said Park Overpass."

Now then——

Mr. Wulff: That is all. They were in the exclusive possession and control of Coon.

The Court: Well, let us assume for the sake of argument that Coon had the animals out there on your land and you knew about it. Is there any question but what Mr. Perine——

Mr. Wulff: He ascertained it during off hours.

Is that knowledge to us? He wasn't acting in the scope of his employment. It was off hours.

The Court: Apparently he received the animals at off hours, so he had some duty. He said his hours were from four to midnight and he made this entry in here on the left hand side which I am going to look at now at 10:00 a.m. So he was off duty when he made that entry.

Mr. Wulff: No, I think not, I think that was made in the office, he said it was made at the office. So therefore he did that during his hours on the job.

The Court: Well, four to midnight and 10:00 a.m. do not——

Mr. Wulff: Well, but he made the entry then. The book is kept in the office. He had to be at the office to make it. [334]

The Court: I know, but if he knew these facts to make the entry, it occurred at 10:00 a.m. in the morning.

Mr. Wulff: That is right, he knew about it.

The Court: And he was off duty.

Mr. Wulff: But the proposition is—in other words, all knowledge of our employees when they are not acting in the scope of their employment is not knowledge of the company.

The Court: It is the minute they put it in this book here.

Mr. Wulff: Yes, but he didn't put in that they escaped in the book. He didn't put in the book that the cattle were outside of the wooden corral.

The Court: But he can't come in here and put

part of the information in here. You are very anxious to rely upon this statement in here that they were unloaded by the owner.

Mr. Wulff: That shows they left our possession and shows that our contract was completed.

The Court: Can you seriously argue to me that your employee can tell you half the facts in the matter and you rely upon that and the other half he keeps a secret to himself and you are not bound by it?

Mr. Wulff: If your Honor please, I think the law of master and servant is clear, that the employer is only liable for the knowledge of his servant acquired during the course and scope of his employment. [335]

The Court: Well that is out, then, because you didn't acquire that information about the stock coming in during the time of his employment. If your argument is sound that part of it is out and there is nothing in this case to show that Coons ever received the animals.

Mr. Wulff: Yes, Mr. Courtney here said that he helped Mr. Coon feed the animals.

The Court: That doesn't prove that he had received them from you.

Mr. Wulff: There is no proof—in the first place, the Court has overruled that the contract provides that the loading and the unloading shall be, as the contract says—that is a part of the contract here—"The shipper at his own risk and expense will load and unload the cattle." That is the contract.

The Court: Mr. Wulff, I understand that part of the thing, but do you mean by that that you could bring a carload of animals in here to Sacramento, let's say a bunch of Brahma bulls into Sacramento here and just open the door and say, "So, here you are, Mr. Consignee, here are your Brahma bulls, you catch them any way you can," and kick them out the door and let them run in every which direction——

Mr. Wulff: We are dealing now with a case in which the plaintiff has the burden of proof. Now the presumption is that the contract has been performed. Now they have got to prove to the contrary. They have not proved to the contrary. [336]

My ground is that they haven't proved their cause of action. You are saying they can prove it, but they haven't proved it.

The Court: No, I am not saying that. I am saying that the testimony in this case is that these animals were out on the property that you have stipulated belongs to the Southern Pacific Company. Now what is your duty under those circumstances? Does the entire burden fall upon Mr. Coon or are you by reason of the fact that you are letting your consignee keep his stock on your property assuming liability.

Mr. Wulff: The Court is assuming that we have permitted the stock to be kept in the wire enclosure. There is no proof at all. The only evidence in here came from our man, Mr. Fisher, who said the only thing he permitted him to use was the wooden corral.

The Court: Mr. Perine said he saw them there.

Mr. Wulff: But in their possession, it was their cattle, they owned them. We had no control over them. Our contract had ceased. Now——

The Court: Now wait. You are evading my question, though. My question is: Suppose they were Mr. Coon's and in his control. Can you allow animals to remain on your property there and assume no responsibility?

Mr. Wulff: Number one, now, we haven't got that question in this case. [337]

The Court: Why not?

Mr. Wulff: Because the negligence charged is that we were so negligent, careless and reckless in our said care, custody and control, ownership and maintenance of said horses and mules as to allow them to stray.

We had no care, we had no custody, we had no control, we had no ownership, we had no maintenance of those horses.

The Court: Well, if you are saying to me that because Mr. Coon and Tex were out there herding these animals, that that exonerates you completely from any allowability——

Mr. Wulff: I am saying this one step further; I say the moment those horses were taken off the cars our care, custody, control, ownership and maintenance ceased.

The Court: All right, let's go back to the Brahma bulls. They come up to a place here and you open the door and let the Brahma bulls out and

say, "All right, Tex, you and Coon catch these Brahma bulls anyway you can here," and the Brahma bulls go out and kill somebody's little girl across the street there.

Mr. Wulff: If they proved that here then they would have something, but they didn't prove that.

The Court: What did they prove?

Mr. Wulff: They didn't prove it at all, no, because they were unloaded from our cars and put into the pens and the door closed on the 16th day of December. [338]

Now the evidence of Courtney is "we let them out of the pens on the morning of the 17th, the next day, because they feed easier outside than they do inside, although we could have fed them inside."

The Court: I realize that, but that goes to the weight of the evidence rather than the question of——

Mr. Wulff: Oh, no, no.

The Court: Now, wait a minute, let me finish——

Mr. Wulff: The answer is that they had been delivered to a safe place, if your Honor please, one day.

Now a stranger to us with whom we had no relationship at all at that time, he is not even a bailor any more, because the shipment has arrived, lets them out by his voluntary act.

In other words, we must be an insurer to be liable.

The Court: Well, you have seen that this stranger has let the animals out of your pen out

there. What I want to know is, is there any liability on your part?

Mr. Wulff: Utterly none. Why? Because he has got the exclusive control and custody over them, they are his own cattle. If we said, "Get them back in," he could tell us to go jump over the moon, and what could we do about it?

Sure we could start procedure, "Now you have broken your permit." But before we could do that the cattle have escaped.

Furthermore, we have got the evidence in here that he is a skilled livestock man. We have got two men there that are [339] skilled livestock men. They are skilled livestock men.

The Court: I am thoroughly conscious of that fact, but Mr. Conrad—was that his name?—said that he saw both Tex and Coon there——

Mr. Wulff: That is right.

The Court: ——watching these animals.

Mr. Wulff: That is right. Now they escape. The day before they were in our cars. Now we are liable. They are on our property by permission. Now——

The Court: I am prepared to say that I feel definitely that the mere fact they were in your car the day before does not cast any liability upon you, if the evidence is that this was a concluded transaction, you were at the end of the line here. But, on the other hand, now, the point that Mr. Miller and Mr. Robertson make is, when you allowed this stock to remain upon your property there do you owe any duty to the public to see that they do not escape.

Mr. Wulff: We owe—it is no more than being—I don't care, they have a possessory right, do they not, whether they are on there as a bailment, whether they are on there as a lessee or whatnot? I don't care if they are there for one day or ten years, it is a possessory interest in land, is it not?

The Court: Well, I am not talking about the land.

Mr. Wulff: Yes, I am, that is exactly what you are [340] talking about. You are talking about——

The Court: Well now, Mr. Wulff, I may not know much, but I don't think you know what I am thinking.

Mr. Wulff: That is possible.

The Court: What I am trying to get over is, if you allow animals to remain on your premises, is there any duty on your part to see that the public is prevented from being harmed by those animals?

Mr. Wulff: None whatever.

The Court: All right. Now, where is your authority for that?

Mr. Wulff: The authority is logic. If your Honor please, that is not our cause of action here, I am not prepared to defend this case on that theory, because we have not been charged with it, we are charged with——

The Court: I think when you were charged with the maintenance of this stock there that that is sufficient——

Mr. Wulff: All right. In other words, the proof shows that we are not maintaining them, that Mr.

Coon is maintaining them. He unloaded them. Now that is their proof, that is not my proof. They are bound by it even though I am not on that situation.

Now let me answer the question—in other words, we give them the possessory use of that land. Now, if they bring property on that land and it strays it is their obligation, [341] because we have given them the permission to use the land for that purpose. It is a lessee obligation, if any. There is no liability of a lessor. Whether it is for one minute or ten years, whether you call it a bailment or whether you call it lessee, it makes no difference. There is utterly no liability, never has been in the law, for a lessor liable for a tenant leaving cattle stray from the land.

Take Section 443 of the Agricultural Code, what does it provide for liability in this case?

It says here, “No person owning, controlling the possession of, any livestock shall wilfully or negligently permit such livestock to stray upon or remain unaccompanied by any person in charge and control thereof upon a public highway.”

That is a statute they call it to the Court’s attention.

That is not the Southern Pacific Company. We were not the owner of the cattle, nor were we controlling and in possession of it.

For the simple reason we let somebody use our premises and they negligently let the cattle escape, how can you fasten that liability upon a lessor?

The contract has been let. He had a right to stay

there for twenty days during that diversion period, if he wished. He has bought that and paid [342] for it.

We can't control him while he is there. He has got possession and he has got ownership.

The Court: Suppose Mr. Coon decided that in the interest of saving money he would turn the animals out to graze along the road there during that twenty day period, what then?

Mr. Wulff: Could we stop him? Our relationship had ceased with him. He could have driven his cattle off of our premises. We may not let him back, but they may have escaped, they may have strayed while they were off, or they may have gotten out the next day after he drove them back.

In other words, they were in his custody. He had two men with him.

Now I don't think there is any proof of negligence. We don't know how they got out. There is no proof at all.

Now Section 423 of the Agricultural Code says that they have the burden of proof *res ipsa loquitur* is not applicable. They have to prove it. There is no proof of negligence here. Even the straying, they don't show how they got away, and that they have got to prove. The last proof is they were in their control at a quarter to four that afternoon, and the next proof we have is at five thirty the officers said they were out.

Now what happened in the meantime? Is the matter of fact that they did stray proof of negli-

gence? 423 of the Agricultural Code says it is not, by express statute in this [343] State.

Is the Southern Pacific Company liable merely because they strayed, because it is possible they could have got out this way or that way? I say not. I say they have the burden of proving how they got out. Utterly no proof as to what happened there.

Anything further, your Honor?

The Court: No.

Mr. Miller: I have just a few very short things to say, your Honor. First of all I think it is quite clear that we are not dealing with a lessee-lessor relationship here. There is no lease of the property which was ever shown.

The Court: Well, on what do you predicate that? I assume there was no formal lease, all right, but if this rule here that they have twenty days that they can keep them there in the pen—what is the relationship? A bailor and bailee——

Mr. Miller: Well, I think they are a licensee, they are allowed to come on the property with the consent of S.P. to feed them. I might point out that what we have here and what we have established was a long standing custom between Mr. Coon and the Southern Pacific Company, in addition to whatever contractual relationship they might have had whereby he had indicated in early times that he wished to come onto his property and feed the mules. [344]

Now, I think the contract, if you will look at it, will show that the mules can stay there in the yards

for 20 days, but it doesn't prevent the S.P. from using that for other animals. There is nothing to prevent the S.P. from bringing in other animals and storing those animals in the corrals.

And, as I said, there is nothing in the contract that says that Mr. Coon shall have the right to come in and feed those animals. That was handled through an agreement reached between Mr. Coon and Mr. Fisher, which was course of conduct between the two.

The Court: Well, now, the tariff here says "Custody and possession of livestock while feeding, watering, resting, sorting and/or consolidating, shall be that of the owner and not that of the carrier."

Now, under the law these tariffs here are a part of any contract. They are specifically incorporated through the bill of lading or waybill or whatever you want to call it.

Mr. Miller: I might say, your Honor, there was in the record that Mr. Coon obtained permission from the Southern Pacific to go in there and to feed those animals.

I might say this: The evidence is clear that at a quarter to four on the day of the accident those animals were outside of the wooden corrals and inside that fenced in area. I also might note that Mr. Wulff erroneously stated that Mr. Coon built part of that fence. The testimony is that he put an [345] extra strand on part of it. The fence was already there.

The Court: No, the testimony in that regard was that he put one wire across one-third of the south

side of it to make the enclosure. That was the testimony, as I remember, and that he also put up some wires around the fence to reinforce it where it was in bad condition.

Mr. Miller: Well, I might say, going back to that wire fence that surrounded the area, that the fence was there for around five years and was known to be there by the Southern Pacific people. The Southern Pacific allowed that fence to continue on the property. I state that the existence of that fence could have only one purpose, and that would be to enclose livestock, and it can constitute invitation to people using that corral to take livestock out there and feed them in that area.

The Court: Isn't the Southern Pacific entitled to assume that people will obey the law and people who use their property will use it in a lawful manner? They don't have to go around and tell everybody, "Now, look, if you are going to use our property, you are going to use it lawfully and not violate Section 423 of the Agricultural Code."

Mr. Miller: But in this particular case, if your Honor please, the S.P. had actual knowledge that those animals were outside the corral and were being fed outside the corral. I might say this, [346] too——

The Court: Yes, but your evidence is conclusive, too, that there was never any time when those animals were alone there. Mr. Perine said he only saw one man there, but your own witnesses said there were two people there, Tex and Coon.

Mr. Miller: That was an earlier time, your

Honor, at 10:30 in the morning. Mr. Perine was talking about a quarter of four in the afternoon.

I might say this. If we are going to look at the contracts, we have got to assume one of two things: Either Mr. Coon had the right to use only the wooden enclosed portion as a corral, because if that was the only portion he was allowed to use, he had no right to take them outside. I think you will agree with me on that.

The Court: How does that help us in this case here? If Coon was violating the law, doesn't that come right back to the statement I stated a moment ago, the presumption is that everyone obeys the law.

Mr. Miller: Well, they acquiesced in his conduct, they saw him doing it, and they didn't—

The Court: They didn't see him turn them out on the street; they simply saw him out there on this land, and while the fence was grossly inadequate to have left them there all night, we don't know from the evidence where they did escape from.

Mr. Miller: Well, I think the Court can draw an inference from the testimony in the record that that fence was a very [347] poor fence, was grossly inadequate. Mr. Courtney testified, as I recall, that the mules could have got out of there if they wanted to. There was no real problem in the mules getting out. I think we can draw an inference from the fact that a short time before the accident they were out in that area where they could easily escape, and draw an inference that that is where they did escape.

The Court: Suppose the Southern Pacific provided an adequate corral for them out there, and Coon, for reasons of his own, whether they were good, bad or indifferent, elected not to avail himself of these adequate corrals provided by the Southern Pacific and took them out to this inadequate place out there, what could they do about it?

Mr. Miller: Well, let me say this, your Honor—first of all, I would like to make my other point:

It is difficult to say what is meant by the Washington Corral. One definition of it would include only the wooden—a corral is an enclosed area; one definition would include only the wooden enclosed area; the other definition would include also the outside area which had the wire fence around it.

Now, I might say that if he had the right to use both areas, that S.P. had the duty to make both areas safe. If he had the right to use only the wooden area, then I believe S.P. had the right to remove those animals from that portion of the property which he had no permission to use. [348] Or, they did not do that. They acquiesced in his using that property, and even though the surrounding fence was in very poor condition and it was very easy for the animals to escape—

The Court: Let me pose a question to you in this regard here: Suppose I have a piece of property that has good fodder on it, good grazing on it, but no fence around it, and I have no animals on it at all, but my neighbor, who is a very bad farmer, doesn't keep his fences up and his animals are all

the time getting over into my field, and I am a slow, easy going sort of a person and I don't want to arouse my neighbor, so I go over and put the animals back and do everything in the world I can do to avoid a row, and this goes on for days or weeks or months, and then all of a sudden one day one of the animals that has been getting over in my place regularly, and I knew that he was getting over there, gets out on the road and somebody hits him with an automobile. Am I liable?

Mr. Miller: I think it is a different situation there, your Honor. I think in a situation like that, that first of all you are not maintaining any services for hire for this neighbor, and secondly you have done everything that is to be reasonably expected of you under the circumstances.

The Court: Well, let's put it a little nearer the situation we have got here: My neighbor isn't a neighbor at all, he is my renter, he rents this one piece from me here; but he has the absolute duty of keeping up the fence around [349] there, and when I rented the piece to him it had a good fence, but for reasons of his own he cuts the fence and lets the animals get out, and, as I say, I am an easy going fellow and I don't want to have a row with my tenant, and all I say is, "Can't you get those stock back in and can't you keep them in," but I don't do anything about it at all, I just let things go on, they tramp around through my fine lavina clover or whatever I have on this place here and the next thing I know after they have been in there one of them gets out on the road and gets killed.

Mr. Miller: There, your Honor, you stated that you are leasing the property. I believe your tenant would have the exclusive right of possession and that you would not have any exclusive right—in other words, you have made a conveyance of land there, and I don't believe there was any conveyance of land in this case.

The Court: Well, what was it, then? They had a right or a license of some sort to be over in those corrals, didn't they?

Mr. Miller: I think the most dignity we can give to Mr. Coons' or Mr. Owens' right actually is a license. I don't think we can dignify it, as Mr. Wulff did, by calling it a lease. I think he is a licensee, and the cases I cited as to negligence permission, the land owner acquiescing and permitting negligent conduct by a licensee on his property causes [350] the owner to be liable.

The Court: Of course, there is only one fallacy in that situation: This negligence didn't occur on the property, it occurred off of the property, or the damage occurred off the property.

Mr. Miller: That is the unusual part of the case, your Honor.

The Court: Well, those are all the questions I have.

Mr. Wulff: There is just one point, your Honor, I want to call to your attention. Mr. Courtney, their own witness, testified that Mr. Coons stretched the wire to fence a small piece off, which was sufficient to hold cattle in there if watched but not sufficient

if the cattle wanted to get out. He said if watched it was sufficient. That was his testimony.

The Court: He testified that they put this one wire across one-third of the south portion of the property there.

Well, I think we have reached a place now where we are just talking.

Mr. Robertson: Yes, your Honor.

The Court: Mr. Wulff, how long do you anticipate it will take you to adduce your evidence in this case if called upon to do so?

Mr. Wulff: I can't get it done today, I am sure. I am trying to get to Colusa tomorrow. I kept my head down boring in for that purpose. [351]

The Court: What?

Mr. Wulff: I kept my head down boring in for that purpose.

The Court: Well, I was going to say if you can't get done today—did you say you could or couldn't get done today?

Mr. Wulff: I don't think so.

The Court: Well, if you can't get done today you are not going to be in Colusa under any circumstances.

Mr. Wulff: If I get a non-suit I am.

The Court: I know, but what I am getting at is I'd like to take a little look at the books myself here before I have to act on this, and if you can't finish today under any circumstances—assume I take an hour now to look at this could you finish tomorrow?

Mr. Wulff: Oh, yes, your Honor.

The Court: In other words, we can't finish today, and you can't go to Colusa tomorrow unless I grant the non-suit?

Mr. Wulff: Yes, that is right.

The Court: And I will tell you if I have to act on it now without reading a little bit you know what the answer will be. So I think we better take——

Mr. Wulff: We have Dr. Grayson coming at 3:00, who postponed a trip for tomorrow to be here. Could we put him on? [352]

The Court: Well, if we do then the motion will be denied, that is all. In other words, I like to accommodate these doctors, but I have got to run this court here, I have people on my back, I have Judge Denman calling me up because my calendar isn't up——

Mr. Wulff: The doctors are running us, your Honor.

The Court: What?

Mr. Wulff: The doctors are running us.

The Court: Well, let him make his trip today.

Mr. Wulff: I like that.

The Court: The only point I am getting at is I am under the gun all the time here. While I don't have sick patients to worry about I have got a lot of people otherwise to take care of.

Mr. Diepenbrock: Well, he is more of a business-like doctor, your Honor. He is an X-ray reader, your Honor.

The Court: Well, nobody is going to get hurt if he has to wait.

Well, we are going to stand in adjournment until

3:45, and I am going to do some examining here.

Now, if anybody of you gets any bright ideas where you have got a case to support it—I don't want any more talk, but if you have got a case to support a bright idea you can pass it in to my secretary and she will see that I get it; but I am not going to see anyone, because I am going to go [353] in there and commune with the legal books for a while until 3:45, and I will announce my decision on this question.

Mr. Wulff: I think 140 Cal. App. is the only case you can find.

The Court: Well, I only say that so that if you do get some authority you can pass it on to me. I don't want to be interrupted unless you have got an authority.

Mr. Wulff: We will be very happy to——

Mr. Robertson: I didn't realize you were going to it under submission. I have several other authorities I would like to cite to your Honor on the proposition of maintaining cattle.

The Court: Well, what were you doing all this time, Mr. Robertson? That is what I was trying to get you to do was to get these authorities collected here.

Mr. Robertson: I would like to cite to you Jackson v. Hardy, 70 Cal. App. 2nd, 6.

And Anderson v. I. M. Jamieson Corp., 7 Cal. 2nd—60, and Galeppie Bros. v. Bartlett, 120 Federal 2nd, 28.

I believe I cited to your Honor the other cases.

The Court: All right. Stand in recess until 3:45.

(Recess.) [354]

Thursday, March 8, 1956—3:50 P.M.

The Court: Gentlemen, I have been in my chambers since we recessed and I have looked, I think, at all but some of the Eastern cases. I did not have them available and I have not looked at them, but I have looked at all the other cases that were cited in the arguments.

I feel constrained to say that the case of *Rutherford v. Reilly* is controlling in this case, and in the face of that I just don't believe the plaintiff could prevail in this case. And under the circumstances, rather than to run up additional expense and increase the record in the matter I might just as well be honest with you and be honest with myself and grant this motion at this time. I am going to grant it on its merits and I direct findings to be made in this matter by the defendants and presented to me in the usual course.

I will say in that regard that I find that Mr. Grigg was not guilty of contributory negligence at the time of the accident; that I find that the animals in question were outside of the control, custody or ownership of the defendant Southern Pacific Company and were in truth and in fact in the custody, control and ownership of the consignee—I don't know what his initials are—Cun, anyhow, and in preparing your findings so find.

I say that I find that Mr. Grigg was injured as a result of this accident, but in view of the other ruling I [355] do not think it is necessary for me to define as to the nature and extent of his injuries at this time, although you may make the general finding that he did receive injuries as a result of the accident, and his car was damaged as a result of the accident.

Now, then, the point is that I am convinced as a matter of law that the plaintiff cannot prevail in this action. If I am wrong, an upper court would have to make that statement. If we spend another day trying this that just adds to the expense and the trouble and the difficulty of getting the matter before the appellate court.

And in that frame of mind I do now grant the motion for an involuntary dismissal of this action on the merits.

Mr. Robertson: If it please the Court, I would like to request two thing alternatively: number 1, that we have a finding by the Court as to where the termination point of the shipment was. I think that becomes, as your Honor related earlier, a very important matter.

The Court: Well, I am convinced on the record as it appears before me that the animals were shipped from Texarkana to Sacramento, and that they were diverted from Sacramento to Santa Rosa. I do not believe that they were ever shipped from Texarkana to Santa Rosa. Now that finding I am perfectly willing to make.

Mr. Robertson: Now one other thing, your Honor; I [356] would like to suggest something—you might think it is unusual, but I think it will save a lot of time and effort, perhaps.

Since I have argued before you I have gone to the law library and found two things: number 1, that where a way bill of lading has one destination on it and a change is endorsed on that showing another destination, there is a presumption that there is a continuous transit from the point of origin to the changed point of destination. There is a presumption on that, and I would therefore suggest, since your Honor indicated that our case either stands or falls on that point of where the destination was, that if I could——

The Court: I didn't mean it in that sense of the word. I meant that it would stand or fall on the question of whether or not these animals were in the possession, control or ownership of the Southern Pacific Company, and I find definitely that they were not at the time that this accident occurred.

Mr. Robertson: Yes, your Honor, but the point I was making is this: Would your Honor be willing to do this, having in mind the cost of appeal, that the matter be continued for say five days or so to allow us to prepare written briefs, because I feel, your Honor, that when I present these authorities we can show that the transit was continuous to Santa Rose. By virtue of that and another case I have recently uncovered, [357] *Snyder v. King*, that where the transit is continuous, regardless of whether——

The Court: I think you better do that in the nature of a motion for a new trial. In other words, I want to terminate this matter now, because if I continue this for five days and then I have to start over again, then I have got my whole calendar fouled up on the matter.

You have closed your case in the matter and you have a right to make a motion for new trial and it will be given careful consideration. I am not prepared to say that this isn't a close matter. I don't want anyone to get the impression that it is just one of those things where you can even decide it right now, because it isn't that sort of thing at all.

Mr. Robertson: I think it is a very difficult legal question.

The Court: I think so, too, and I think you can reach it better, more satisfactorily, on a motion for a new trial than you can by a continuance, because of the nature of my calendar here. If we get fouled up on the matter here it might run along for weeks before we ever get the thing out of the way.

Mr. Robertson: Well, yes. The only one thought I have on a motion for new trial, if we did convince your Honor on the law we would have to go to the expense of reputting in all the evidence, unless we could arrive at some stipulation [358] on the record.

The Court: Well, if you get me reversed you will have to do the same thing.

Mr. Robertson: Yes, that is true, your Honor.

At any event, your Honor will instruct that the other finding be made that the terminal point is Sacramento, California?

The Court: No, I will say that I am convinced that the animals were originally sent from Texarkana, Texas, to Sacramento, California, and they were diverted from Sacramento. That finding may be made in accordance with the record.

Mr. Wulff: Mr. Reporter, may I have a transcript of the statement of the Court so we can have it clear in preparing the findings.

The Court: Well, that is very flattering of you, Mr. Wulff, to say that the thing will be clear after you have looked at what I have said.

Mr. Robertson: I would like to have a copy so I can compare the findings.

The Court: And naturally you will have an opportunity to propose any—or make any suggestions you might wish in that regard.

Mr. Wulff: We will submit it, your Honor.

The Court: Certainly I have no arbitrary feeling about the matter.

[Endorsed]: Filed July 27, 1956. [359]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case,

and that they constitute the record on appeal herein as designated by the parties:

Petition of Southern Pacific Company for Removal from State Court to United States District Court, together with attached documents:

Complaint,
Summons,
Answer.

Motion to Remand Civil Action.

Notice of Motion to Remand Cause with Affidavit of Charles J. Miller, attached.

Answer to Petition of Southern Pacific Company for Removal of Cause with attached documents.

Memorandum and Order, filed December 5, 1955.

Minute Order of December 19, 1955.

Amendment to Complaint.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Motion for New Trial and for Amended Findings with Motion for.

New Trial and for Amended Findings and Memorandum of Points and Authorities in Support of Motion for New Trial attached.

Memorandum and Order, filed July 16, 1956.

Plaintiff's Notice of Appeal to the United States Court of Appeals.

Plaintiff's Bond for Costs on Appeal.

Appellant's Statement of Points on Appeal.

Plaintiff's Designation of Record on Appeal.

Defendant's Designation of Additional Portion of Record on Appeal.

Reporter's Transcript (Vols. 1 and 2), pages 1 through 359.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 11, 12, 13, 14, 16, 17, 18, 19 and 30 in evidence.

Plaintiff's Exhibits Nos. 9 and 10 for identification.

Defendant's Exhibit No. "A."

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 1st day of August, 1956.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 15220. United States Court of Appeals for the Ninth Circuit. Glen Earl Grigg, Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: August 3, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 15,220

United States Court of Appeals
For the Ninth Circuit

GLEN EARL GRIGG,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellee.

Appeal from Judgment of the United States District Court
for the Northern District of California,
Northern Division.

Honorable Sherrill Halbert, Judge.

APPELLANT'S OPENING BRIEF.

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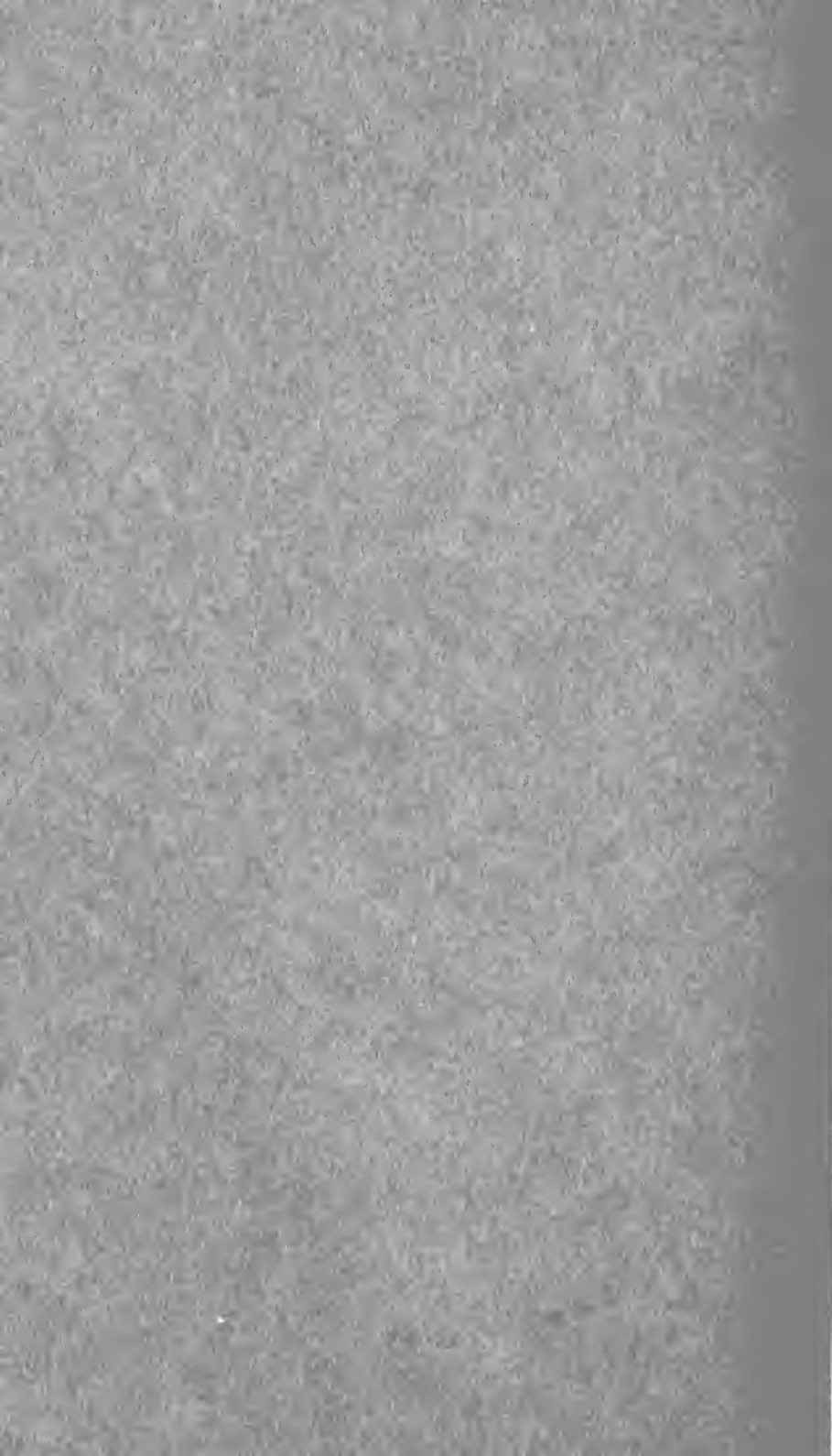
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FILED

JAN 21 1957

PAUL P. O'BRIEN



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No. 15,220

United States Court of Appeals For the Ninth Circuit

GLEN EARL GRIGG,

Appellant,

VS.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellee.

Appeal from Judgment of the United States District Court
for the Northern District of California,
Northern Division.

Honorable Sherrill Halbert, Judge.

APPELLANT'S OPENING BRIEF.

STATEMENT OF PLEADINGS AND JURISDICTION.

This was an action for damages for personal injuries sustained by the appellant while operating his car on U. S. Highway 40 in an easterly direction toward Sacramento. Approximately one mile from Sacramento on a freeway the appellant was suddenly confronted with a large number of mules running up onto the freeway and his car collided with the mules, and the appellant was injured.

The complaint was originally filed by appellant in the Superior Court of the State of California, County of Sacramento, bearing docket No. 100994. (Trans. of Rec., pp. 9-14.) The suit instituted by appellant in the Superior Court named Harver Coon Gendel, Southern Pacific Company, a corporation, and First Doe to Sixth Doe, inclusive, as codefendants. The complaint alleged that the defendants, and each of them owned, possessed and controlled certain mules or horses in the immediate vicinity of U. S. Highway 40 in such a negligent, careless and reckless manner as to allow said animals to stray upon the highway and into the path of plaintiff's oncoming car so that the car of plaintiff was caused to be struck by one or more of said mules or horses. (Trans. of Rec., p. 11.) Service of process was effected upon Southern Pacific Company and that defendant filed an answer to the complaint. (Trans. of Rec., pp. 14, 15.) The appellant was unable to effect service of process upon Harver Coon Gendel in that he had removed himself from the State of California and could not be located.

Following the filing of the answer of defendant Southern Pacific Company and prior to the trial date of said action in the State Court, appellee, Southern Pacific Company, submitted itself to the jurisdiction of said Superior Court by procuring and taking depositions within the jurisdiction of that Court and by procuring the physical examination of the plaintiff within the jurisdiction of the Court, by stipulation to the use of the doctor's deposition in the jurisdiction

of the Superior Court, by the stipulation to the admission in evidence in said Superior Court of certain exhibits and documents. (Trans. of Rec., pp. 19-22.)

On November 15, 1955, the action came on for trial before the Superior Court, sitting without a jury, and after commencement of the proceedings the appellant was required to dismiss without prejudice the action against Harver Coon Gendel for the reason that he could not be served and was not within the jurisdiction of the Court. (Trans. of Rec., p. 6.) However, the appellant did not dismiss this action as to the six Does named as codefendants in the action. (Trans. of Rec., pp. 23, 24.) On November 15, 1955, after both the appellant and appellee had appeared in the Superior Court and announced their readiness to proceed to trial, and after stipulations and depositions had been exchanged between the parties under the jurisdiction of that Court prior thereto, and upon the dismissal without prejudice of the defendant Gendel, the Southern Pacific Company did file its motion to remove cause to the United States District Court, Northern District, Northern Division. The Superior Court thereupon suspended proceedings pending determination of said petition of removal. The appellant immediately thereafter filed his answer to the petition of Southern Pacific Company for removal of cause. (Trans. of Rec., pp. 23-26.) Said answer to the petition had attached thereto Exhibit "A", being a transcript of the proceedings had before the Superior Court on November 15, 1955, and which transcript is contained in this Transcript of Record pp. 27-41. The

proceedings before the Superior Court demonstrate that the only defendant dismissed without prejudice from the action was Harver Coon Gendel and that none of the fictitiously named defendants were dismissed. (Trans. of Rec., pp. 30-31.)

In addition to answering the petition for removal, the appellant filed a motion to remand civil action (Trans. of Rec., p. 16), together with supporting affidavits. (Trans. of Rec., pp. 17-23.) On December 5, 1955, the United States District Court entered its order denying appellant's motion to remand civil action to Superior Court. (Trans. of Rec., pp. 41, 42.)

At the time the action was pending in the state Superior Court the appellant had a motion before said Court to amend his complaint to increase the amount of damages prayed. When the defendant caused the action to be removed to the Federal Court, the Superior Court suspended the proceedings and did not determine the motion to amend the complaint. Subsequently, after the United States District Court had denied appellant's motion to remand cause, the motion to amend the complaint was renewed and the United States District Court granted said motion authorizing an amendment to the complaint increasing the prayer to \$70,000.00. (Trans. of Rec., pp. 42, 43.) The action was thereupon set for trial before the Court without jury, commencing Tuesday, March 6, 1956, and said trial continued from day to day, and the appellant completed his case in chief on March 8, 1956. Thereupon the defendant Southern Pacific Company moved to dismiss the action and, thereupon,

the Court did enter its order dismissing the action upon the merits and entered judgment thereupon, following the submission of findings of fact and conclusions of law. (Trans. of Rec., p. 48.) A motion for new trial was made and denied. (Trans. of Rec., p. 52.)

A. Jurisdiction Upon Which the Case Was Removed to the United States District Court.

The jurisdictional grounds upon which the case was removed from the state Court to the federal Court was that of diversity of citizenship. (Trans. of Rec., pp. 7, 8.) The jurisdiction which the United States District Court impliedly found to exist (by virtue of its denial of appellant's motion to remand cause to the Superior Court) was impliedly diversity of citizenship.

B. Jurisdiction of United States Court of Appeals.

The United States Court of Appeals has jurisdiction to hear the appeal in this matter stemming from the statutory grant of jurisdiction contained in 28 U. S. Code, Sec. 1291. The United States Court of Appeals further has jurisdiction to determine the jurisdiction of the United States District Court and the propriety of the denial of the motion to remand the case to the state Court under Sec. 1291, 28 U. S. Code Annotated. Further, there have been innumerable decisions holding that the United States Court of Appeals has jurisdiction and is required to determine jurisdiction of all cases before it. In *Brooks v. Laws*, 208 Fed. 18, 92 U.S. App. D.C. 367, it was stated that

every Court has jurisdiction of every phase of a proceeding to consider the jurisdiction of the Court or of inferior Courts. In *Venner v. New York Central Railway*, 293 Fed. 373, affirmed in 46 Supreme Court 444, 263 U.S. 127, the United States Court of Appeals determined the question of the jurisdiction of the United States District Court to hear and determine a cause and found that the lower Court did not have jurisdiction to hear the matter and ordered the case remanded to the United States District Court with an order for said Court to remand the cause to the state Court from which it had been removed. Similar rulings have been made in the following cases:

South Carolina State Ports Authority v. Seaboard Airline Railroad Company, et al., 124 Fed. Supp. 533;

Thompson v. Standard Oil Company of New Jersey, 67 Fed. 2d 644;

Green v. Green, 218 Fed. 2d 130;

Schroeder v. Freeland, 188 Fed. 2d 517;

Mason v. Webb, 142 Fed. 2d 584; certiorari denied, 65 Supreme Court 588, 323 U.S. 747.

C. This Action Was Improperly Removed From the State Court to the United States District Court and the District Court's Order Denying Appellant's Motion to Remand Was Erroneous.

1. Diversity of Citizenship Did Not Exist.

The complaint filed in the Superior Court, Sacramento County, asserted a citizenship of the defendant Southern Pacific Company as of the State of Delaware and asserted a domiciliary of the defendant Harver

Coon Gendel as of the State of California. The complaint did not assert the citizenship of the plaintiff, nor the citizenship of First Doe to Sixth Doe, inclusive, defendants. The recorded transcript of the proceedings, at the commencement of the trial in the State Court on November 15, 1955, demonstrate that the plaintiff dismissed without prejudice as against defendant Gendel only, but the six fictitiously designated defendants remained in the case and appropriate charging allegations had been made against all the defendants. (Trans. of Rec., pp. 30, 31.) The transcript before the Superior Court likewise demonstrates that 30 days prior to Nov. 15, 1955, the plaintiff notified the defendants that they were unable to serve Gendel and that the action would be dismissed without prejudice as against that defendant. (Trans. of Rec., p. 35.) This statement presented to the Superior Court was not challenged by the defendants. The record in the Superior Court further demonstrates that the defendant Southern Pacific Company had conceded to the jurisdiction of the Court and waived right of removal by availing itself of the processes of that Court through the taking of depositions, the submission of stipulations as to production of evidence, documents and other matters.

Further, the record before the Superior Court demonstrates that, at said hearing, counsel for appellant requested the Court to continue the matter for 30 days for the purpose of serving process upon the fictitiously designated defendants. (Trans. of Rec., p. 38.) Further, the proceedings before the Superior Court

on Nov. 15, 1955, demonstrates that counsel for appellant moved the Court to be relieved of its dismissal of the defendant Harver Coon Gendel without prejudice on the grounds of surprise in view of the conduct of counsel for defendant who had previously stipulated to certain matters indicating their submission to the jurisdiction of the Superior Court. (Trans. of Rec., p. 40.)

The affidavit of Charles J. Miller, one of the attorneys for appellant, accompanying the motion to remand cause to the Superior Court demonstrates the numerous stipulations, conduct and submission by defendant Southern Pacific Company to the jurisdiction of the Superior Court, which would estop them from petitioning for removal on the day of the trial. (Trans. of Rec., pp. 19 through 22.)

In *Grasso v. Butte Electric Railway Co.* 217 Fed. 422, a plaintiff instituted a suit in a state Court naming the railroad company as a defendant and fictitiously designating Does as codefendants and asserting that defendants and all of them had negligently conducted themselves. The complaint on its face demonstrated that a diversity of citizenship existed between the plaintiff and the defendant, Butte Electric Railway Co. However, the citizenship of the fictitiously designated defendants did not appear on the face of the complaint. The defendant Butte Electric Railway Co. petitioned to remove the case to Federal Court and the said petition was granted. On appeal, the United States Court of Appeals held that the United States District Court was without jurisdiction because of the

fact that it did not appear affirmatively from the record or the pleadings that the citizenship of all of the defendants (including the fictitiously designated defendants) was diverse from that of the plaintiff. The United States Court of Appeals thereupon remanded the cause to the United States District Court ordering said Court to remand the cause back to the state Court on the grounds that jurisdiction did not exist in the United States District Court.

In order to bring oneself into the jurisdiction of the United States District Court upon the grounds of diversity of citizenship, it is essential that diversity must exist as to all parties whether liability for tort is joint and several and the plaintiff may elect to sue adverse claimants jointly and, if it does not affirmatively appear from the record that all parties codefendant had diverse citizenship as to the citizenship of the plaintiff, the Federal Court is without jurisdiction. In this regard, see *Dollar Steamship Lines v. Merz*, 68 Fed. 2d 594; *Matthew v. Zoppin*, 32 Fed. 2d 100, and *Heintz v. Ohio Casualty Insurance Co.*, 112 Fed. Supp. 199.

It is absolutely essential that diversity of citizenship be ascertained from the allegations in the complaint and the United States District Court is not at liberty to speculate as to the citizenship of parties so that, in the event the pleadings do not disclose a diversity of citizenship as to all parties, the District Court is without jurisdiction to entertain the case. In this regard, see *Kaske v. Rothert*, 133 Fed. Supp. 427, *Heintz v. Ohio Casualty Insurance Co.*, supra, *Schatte*

v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, 84 Fed. Supp. 669, affirmed in 182 Fed. 2d 158, re-hearing denied 183 Fed. 2d 685, certiorari denied 71 Supreme Court 64, 340 U.S. 827, re-hearing denied 71 Supreme Court 194, 340 U.S. 885.

The pleadings in the action upon which the United States District Court was caused to determine the issue of diversity of citizenship demonstrated, that at the time of the petition for removal, the appellant was suing the Southern Pacific Company and six fictitiously designated Does and had charged all the defendants with negligence and sought relief from all defendants. The citizenship was only asserted as to the defendant Southern Pacific Company and the defendant Gendel. No citizenship was asserted in the complaint as to the plaintiff or the six fictitiously designated Does. Further, the record of the proceedings before the Superior Court at the time the petition for removal was made demonstrates that as of that time a dismissal had been entered only as against the defendant Gendel and that upon the basis of surprise the appellant requested leave to withdraw the dismissal and continue the cause for the purpose of serving said defendant. Admittedly, said defendant (by the petition to remove) was a citizen of California.

Under the circumstances, therefore, upon the appellant's petition for remanding of cause, the United States District Court should have remanded the cause to the Superior Court on the basis that the record does

not disclose an adequate diversity case and under the doctrine of *Kaske v. Rothert*, supra, it was not a proper case of removal.

It is submitted upon the basis of the authority herein stated that the within action was improperly removed from the state Court to the United States District Court and that jurisdiction does not exist and that the cause should be remanded to the United States District Court with instructions and order to remand said cause to the Superior Court of the State of California.

For further authority on this proposition see 28 U.S. Code Annotated, Sec. 1332(a) and Federal Rules of Civil Procedure, Rule 8a (1).

2. Appellee Did Not Make a Timely Petition of Removal and Further Submitted to the Jurisdiction of the Superior Court and Was Estopped to Remove Cause to Federal Court.

A petition for removal from state Court to United States District Court must be made timely. The petition of Southern Pacific for removal of cause asserts that it was not until the defendant Gendel had been dismissed that the occasion arose upon which they could move.¹ If this were the only basis for the defendant's assertion of the timeliness of their petition, it is apparent that the record does not bear them out in that the affidavit of Charles J. Miller (supporting motion to remand cause) demonstrates that defendant Southern Pacific Company was notified more than

¹It is to be noted that the petition asserts that there was a dismissal as to all the defendants, but the record before the Superior Court demonstrates that that allegation is incorrect. (See Trans. of Rec., pp. 30 and 31.)

thirty days prior to the trial date that a dismissal would be entered as to the defendant Gendel. (Trans. of Rec., pp. 21 to 22.) This assertion of fact in the Miller affidavit was never controverted at any time by the Southern Pacific Company. Further, the affidavit of Miller demonstrates the numerous stipulations and occurrences in the record adequately substantiating the point that the Southern Pacific Company had submitted itself to the jurisdiction of the Superior Court, having availed itself of the remedies, jurisdiction and authority of that Court. Further, since the petition for removal of Southern Pacific Company is based upon the allegation that on November 15, 1955, the occasion first arose for the removal on the basis that *all* defendants other than Southern Pacific had been dismissed, the petition for removal itself is insufficient to show a timeliness of removal or the right to removal since the record demonstrates that all of the defendants were not dismissed. Thus, on the face of the petition for removal itself, it is disclosed that the petition was improper and insufficient since there had not been a dismissal of all codefendants other than Southern Pacific Company.

This Court's attention is invited to *Powers v. Chesapeake*, 169 U.S. 92, 18 Supreme Court 264. In that case the language demonstrated that the petition for removal must be filed at the earliest time that the cause became removable and before any steps have been taken in defense of the action. The affidavit of Miller in the instant case demonstrates that the defendant took numerous steps in defense of the action,

including stipulations to use of certain evidence before the Superior Court.

It is submitted that there was not a timely petition for removal of cause and that the submission by defendant Southern Pacific to the jurisdiction of the Superior Court estopped said defendant from petitioning to remove and that, therefore, the United States District Court was also without jurisdiction to entertain the suit.

STATEMENT OF FACTS.

A. Admitted or conceded facts.

The following facts are admitted or conceded as is indicated in the findings of fact and conclusions of law executed by the Court on March 30, 1956, and found in Trans. of Rec., pp. 46 and 47.

1. That certain horses or mules were *negligently and carelessly permitted to stray upon U. S. Highway 40* one mile west of Sacramento, California, into the path of plaintiff's oncoming car and plaintiff was caused to be struck by one or more horses or mules, damaging said car of plaintiff and causing plaintiff to sustain certain personal injuries. (Finding VII.)

2. That at the time and place when plaintiff's automobile struck one or more of the horses or mules the plaintiff was operating his car with reasonable care and was not guilty of contributory negligence in the operation of his automobile. (Finding VIII.)

Thus, there is no dispute nor any reason to refer to transcript evidence as to the fact that the mules were

negligently caused to be allowed to stray upon U. S. Highway 40 and that plaintiff's car was caused to collide with them and that plaintiff was injured, and that plaintiff was not guilty of any negligence on his part. Therefore, no further reference to evidence will be made by virtue of the admissions contained in the findings of fact.

B. Disputed Facts.

The disputed facts in the case are as follows:

1. Did the Southern Pacific Company maintain its stock corrals in Sacramento in a reasonable fashion and supervise same in a reasonable and prudent manner?

2. Did Southern Pacific Company owe a duty to the public so long as said mules were held in the Southern Pacific stock corrals?

3. Did H. L. Coon unload and secure the horses and mules in the Southern Pacific stockyard exclusive of any assistance or possession of Southern Pacific Company, and did the Southern Pacific Company maintain any supervision over said animals? Further, could the Southern Pacific Company delegate its duty to supervise and possess said animals in its corrals in a reasonable and prudent fashion so as to relieve itself of any further responsibility in regard to said animals or injury which they might cause?

C. General Statement of the Evidence.

The evidence disclosed that on December 9, 1954, 57 mules were shipped from Texarkana, Texas, consigned to H. L. Coon. That 29 of said animals were loaded

in stockcar AT29117 and 28 head of animals were loaded in stockcar AT27608 routed on the Texas-Pacific Railway, Atchison, Topeka and Santa Fe Railway, Southern Pacific Railroad and, ultimately, from Sacramento to Santa Rosa, by the Northwest Pacific Railway. Plaintiff's exhibits in evidence 16, 17, 18; Trans. of Rec., pp. 287 to 294.)

The record discloses that the animals arrived in Sacramento on December 16, 1954, at 10:00 o'clock A.M., at the corrals of Southern Pacific Company and that the same were then unloaded and placed in the corrals by Mr. H. L. Coon, the consignee, assisted by Mr. Anthony Perine (a Southern Pacific employee whose duties included overseeing Southern Pacific's stockyard and carrol at West Sacramento) (Trans. of Rec., pp. 114 to 120; see also plaintiff's exhibit 11 in evidence, being the stockbook of Southern Pacific Company).

The evidence demonstrates that following the unloading of the mules and placing of same in the Southern Pacific corral, Mr. Anthony Perine, in charge of said corral, notified his superior officers of the Southern Pacific Company that the animals were in the corral and made an entry in the stockbook of the Southern Pacific Company concerning same. (Trans. of Rec., pp. 118-119; plaintiff's exhibit 11 in evidence.)

After the horses and mules had been unloaded and placed in the corral by Mr. Coon, under the supervision and observation of Mr. Perine, Mr. Perine saw that the corral gates were closed and secured and then went down to his company's office and reported the

arrival of the livestock in the Southern Pacific corral. (Trans. of Rec., pp. 136, 137.)

The following morning, December 17, 1954, Mr. Perine, in discharge of his duties as overseer of the corrals of the Southern Pacific Company, went to the West Sacramento corrals around 10 o'clock in the morning and was there approximately fifteen minutes. At that time he observed that all of the horses and mules which had formerly been in the corral had been removed from the corral and were being grazed and fed outside the corrals alongside a public road. Only one person was there containing the animals—to-wit, Mr. Coon. Mr. Perine did not request Mr. Coon to put the animals back into the corral and did nothing to see that the animals were properly restrained so as not to escape along the public road and endanger persons or property. (Trans. of Rec., pp. 122-128.) Again, at about 4:00 o'clock P.M. of December 17th, approximately two hours before the mules escaped onto the highway, Mr. Perine again visited the Southern Pacific corral in West Sacramento and again observed that all of the horses and mules were still outside the corral and were being fed and grazed by Mr. Coon, and no-one else was there to assist him in containing the livestock, and that said livestock was grazing alongside and on a public road. Again, at this time Mr. Perine did nothing to cause the animals to be returned to the corral, although he testified that part of his general duties was to feed and water livestock. (Trans. of Rec., pp. 128, 129.) Mr. Perine also testified that, at both 10:00 A.M. and 4:00 P.M. on Decem-

ber 17th, the date the animals escaped and were allowed to roam upon U. S. Highway 40, the Southern Pacific stockyard corrals were very muddy. (Trans. of Rec., p. 135.)

Mr. Perine testified that, at 8:00 o'clock P.M., on December 17th, he was notified by Mr. McKenzie, chief waybill clerk of Southern Pacific Company, that the mules had escaped from the corral. The stock-book of the Southern Pacific Company, which is plaintiff's exhibit No. 11 in evidence, demonstrates that an entry was made in said stock-record book that said mules and horses had "escaped from the Southern Pacific corral." Mr. McKenzie advised Mr. Perine to phone the chief dispatcher of Southern Pacific Company regarding the escaped horses and mules. Mr. Perine did notify the chief dispatcher and, after said conversation, Mr. Perine did thereupon go out and make a search for the escaped horses and mules. While he was out searching for said animals, he met a Mr. Duke, who was also employed by Southern Pacific Company and who was Mr. Perine's assistant in charge of the corrals, and Mr. Duke and Mr. Perine searched for the escaped animals. (Trans. of Rec., pp. 142, 143.) Mr. Perine testified that he and Mr. Duke, the following morning, found certain of the horses and mules roaming around the corral and that they did put them back into the corral and locked the gate. (Trans. of Rec., p. 144.) After putting the horses and mules back in the corral, Mr. Perine and Mr. Duke made a count of the animals and discovered all were present except two which had been killed the

night before. In the Southern Pacific stock-book kept by Mr. Perine, which is plaintiff's exhibit No. 11 in evidence, the following entry was made by Mr. Duke, to-wit:

"December 18, 1954, 5:00 P.M.: Consignee H. L. Coon. Horses escaped from corral, ran on Yolo freeway and two killed by autos. Turned over to Reduction. One had bad lacerations on the front shoulder when corralled. Signed 'R. D.' "

Mr. Perine stated that the dead mules, which had been killed when struck by Mr. Grigg's car, were located by him and that he phoned a reduction plant and notified the plant that he was a Southern Pacific employee and asked the reduction plant to pick up the mules and take them to the reduction plant for the Southern Pacific Company. (Trans. of Rec., p. 157.)

Mr. Perine testified that on December 18th, around 4:00 P.M. (which was the day following the accident), he and Mr. Coons reloaded the remaining horses and mules from the Southern Pacific corral into the box-cars and that the animals were shipped out to Petaluma. Actually, the records and waybills of lading demonstrate that the animals were shipped to Santa Rosa. (Trans. of Rec., pp. 148, 149; plaintiff's exhibits in evidence Nos. 17 and 18.)

Mr. Sigmund A. Fisher testified that he was freight agent of the Southern Pacific Company at Sacramento and his duties included general supervision of the stockyards of the company in West Sacramento and inspection of the corrals. That, prior to the accident, he had inspected the corrals and knew that the

corrals were fastened shut by a sliding board latch, but that he does not recall any chains or locks being on the gates of the corral. (Trans. of Rec., pp. 281-285.) Mr. Fisher testified that the records of the Southern Pacific Company demonstrated that these two carloads of horses and mules, the subject matter of this suit, were shipped, with the shipment originating with the Texas-Pacific Railway in Texarkana, Texas, and they were routed into Sweetwater, Texas, and from there on the Santa Fe Railroad to Bakersfield and were taken over at Bakersfield by Southern Pacific Railroad and shipped to Sacramento and, subsequently, to Santa Rosa, California. (Trans. of Rec., pp. 287-290.) Mr. Fisher testified that the Southern Pacific Railroad received payment for the shipment and, ultimately, under tariff regulations prorated back to the other carriers their pro rata share. That, Southern Pacific Company was paid for shipment of the animals from Bakersfield, California, through to Santa Rosa, California. (Trans. of Rec., pp. 291, 293.) Mr. Fisher testified that the records indicated that when the horses and mules were transported from Sacramento to Santa Rosa they were carried upon the same railroad cars in which they had arrived in Sacramento on December 16. (Trans. of Rec., pp. 294-295.) He also testified that plaintiff's exhibits in evidence Nos. 17 and 18 (being the waybills of lading) were the only documents involved customarily in such a shipment. On the back of plaintiff's exhibit No. 18, there appears a receipt for the horses and mules in Santa Rosa, California. (Trans. of Rec., p. 303;

plaintiff's exhibit No. 18.) Mr. Fisher also testified that in the past, it had been the custom of the Southern Pacific Company and Mr. Coon, when he receives shipment of horses and mules at Sacramento, to hold them two or three days in the Southern Pacific corrals and then divert them to Santa Rosa or Petaluma. (Trans. of Rec., p. 313.) He also testified that he had in the past observed a makeshift wire fence in the vicinity of the corral, but that he did not know how it got there. (Trans. of Rec., p. 316.)²

Mr. Fisher also testified that there were charges shown on the waybill of lading indicating feeding by a railway company at one station where the animals were rested, but that the rest of the stations are blank as to whether or not a charge was made for feeding. He further testified that the waybills of lading demonstrated that no one accompanied the animals on the trip and that no one had signed a release to the railroad company of liability in accompanying the animals. (Trans. of Rec., pp. 320, 321.) He further testified that no receipt had been signed by Mr. Coon for the animals when they arrived at Sacramento. (Trans. of Rec., p. 321.) He further testified that, when animals are ultimately delivered, the company secures a receipt for delivery of them. (Trans. of Rec., p. 322.) The first receipt signed for these animals was signed in Santa Rosa, California. (Plaintiff's exhibits Nos. 17 and 18 in evidence, being the waybills of lading.)

²This makeshift wire fence is the fence referred to in the testimony of Mr. Courtney and Mr. Houek, to be referred to hereinafter.

Mr. Don Courtney, who was a stockman residing in the general vicinity of the Southern Pacific corrals in West Sacramento, and not an employee of Southern Pacific Company, testified that he had been in the cattle and horse business for ten years and was generally familiar with the habits and general inclinations of such animals. (Trans. of Rec., pp. 238, 239.) He testified that at approximately 10:30 or 11:00 A.M. of December 16th, shortly after the horses and mules had arrived at Sacramento, he observed the horses and mules inside the Southern Pacific stockyard and that the gates were closed by a sliding wooden board latch. (Trans. of Rec., p. 239.)

Mr. Courtney testified that, on December 17th, he brought a load of feed for Mr. Coon to the Southern Pacific stockyard and that the feed was dumped outside of the corral because it was handier to feed the animals on the outside because it was a little muddy inside the corral. (Trans. of Rec., pp. 240-241.) He testified that the mud was 8 to 10 inches deep in the corral and there were 50 to 55 head of horses and mules in the corral. He testified that when he returned to the corral all of the horses and mules were outside the corral and generally in the vicinity of E Street, Broderick, California, between 7th and 8th Streets, which is a public street. He testified that there was a fence between the area where the animals were being fed and the public street, but that it was a poor fence, consisting of two wires stretched in the area and that, if the horses and mules wished to cross it, they could. (Trans. of Rec., pp. 242-243.)

Mr. Courtney testified that after the hay had been placed outside the corral and the horses and mules were grazing there, he had gone to Auburn, California, and returned shortly after dark on December 17th and learned that certain horses and mules had escaped. He testified that, when he got back that evening, they were putting the horses and mules back in the corral.

Mr. Courtney testified that he knew Mr. Coon had a practice of bringing horses and mules to Sacramento and holding them in the Southern Pacific corral and would subsequently ship them out by railway to other places. (Trans. of Rec., p. 246.) He further testified that Coon customarily held the horses and mules in the Southern Pacific corrals for three or four days or a week and then shipped them out again by Southern Pacific Company railroad. (Trans. of Rec., pp. 248, 249.) He testified that there was a makeshift wire fence on the Southern Pacific property outside the corral extending from the corral out and along E Street and back to the corral; that it was a two-wire fence in some places and a one-wire fence in other places, and that the fence had been put up by some horsetraders some five years ago and had existed on the Southern Pacific property for some five years, and that Mr. Coon had patched it up in places. (Trans. of Rec., pp. 256-260.)

Pursant to stipulation contained at page 266 of the transcript of record it was stipulated that there was no written authority in the files of Southern Pacific authorizing Mr. Coon to feed the horses and mules. It was further stipulated and admitted by

counsel for Southern Pacific Company that Mr. Coon paid the freight of the entire shipment in Santa Rosa and that Mr. Coon signed a written receipt for the shipment in Santa Rosa. (Trans. of Rec., pp. 266, 267.)

Mr. George Houck, the state highway patrol officer who investigated the accident and the horses and the mules, and who examined the Southern Pacific corral the following morning, testified at length concerning the incident on the night of the happening of the accident. Since this evidence pertains primarily to the issue of whether or not Mr. Grigg was guilty of contributory negligence, a resumé of that portion of his testimony will be disregarded in view of the findings of fact of the court finding that Mr. Grigg was not guilty of contributory negligence. The testimony of Officer Houck pertaining to his inspection of the corral will be his only testimony reviewed herein.

Officer Houck testified that, the day following the accident, when he went to the Southern Pacific corral he saw that part of it was enclosed by wire and there were not too many wires, some of the wires sagged somewhat. (Trans. of Rec., p. 185.) Officer Houck then marked on plaintiff's exhibit No. 14, the highway map, the location of the Southern Pacific corral in conjunction with U. S. Highway 40 and indicated the various approaches from the corral to the highway, demonstrating that there were numerous avenues from the corral to the highway upon which the mules could move to reach the highway. (Trans. of Rec., pp. 200-207.)

The testimony of witnesses Lillian and Malverne Spansel is omitted from this recitation of facts as not being pertinent to the legal issues presented by this appeal for the simple reason that their testimony relates to the actual happening of the accident on Highway 40. Their car was travelling to the right and immediate rear of the Grigg car and they observed the Grigg car slow down and strike the mule and they subsequently also were confronted with mules on Highway 40 and struck mules themselves. They have no knowledge of the corrals of the Southern Pacific Company or of the facts concerning the custody of the mules. For that reason their testimony is not elicited in this brief.

Plaintiff's exhibits Nos. 17 and 18 are the waybills of lading pertaining to the shipment of the two cars of livestock. One waybill pertains to one freight car of livestock and the other waybill pertains to the other shipment of livestock. On the bottom of the waybills there is stated the various interim substations where the animals were taken from the cars, rested and fed in accordance with both the Federal statutes and the California Agricultural Code. These laws require livestock in shipment to be removed from cars every 28 to 36 hours for rest and feeding. The schedule contained on the two waybills demonstrates the following:

Plaintiff's Exhibit No. 17—Waybill, Freightcar No. A. T. 27608, was loaded at 2:00 P.M. on December 9, 1954, in Texarkana, Texas, with 28 head of mules. The feeding and rest record shows:

FEEDING AND REST RECORD

Unloading Record				Reloading Record		
Place	Date	Time	Count	Date	Time	Count
Sweetwater, Tex.	12/11/54	12:30 a.m.	28	12/11	7:15 a.m.	28
Winslow, Arizona	12/12	3:30 p.m.	28	12/12	11:00 p.m.	28
Barstow, Calif.	12/14	3:20 a.m.	28	12/15	2:10 a.m.	28
Sacramento, Calif.	12/16	10:30 a.m.	28	12/18	4:30 p.m.	27

Plaintiff's Exhibit No. 18—Waybill. Freight car No. AT29117 was loaded at 2:00 P.M. on December 9, 1954, at Texarkana, Texas, with 29 head of mules. The feeding and rest record shows:

FEEDING AND REST RECORD

Unloading Record				Reloading Record		
Place	Date	Time	Count	Date	Time	Count
Santon, Tex.	12/10	11:25 p.m.	29	12/11	7:25 a.m.	29
Winslow, Ariz.	12/12	3:30 p.m.	29	12/12	11:00 p.m.	29
Barstow, Calif.	12/14	3:20 a.m.	29	12/15	2:10 a.m.	29
Sacramento, Calif.	12/16	10:30 a.m.	29	12/18	4:30 p.m.	28

The feeding and rest records of the waybills thus show that both carloads of animals were loaded at Texarkana, Texas, at 2:00 P.M., Thursday, December 9, 1954. They then traveled to Sweetwater, Texas, some 419 miles, arriving there on Saturday, December 11 at 12:30 A.M. They were rested about seven hours and were reloaded. They then traveled from Sweetwater, Texas, to Winslow, Arizona, some 708 miles distant, arriving there on Sunday, December 12th at 3:30 P.M. They were rested in Winslow, Arizona, for about eight hours and reloaded. They then traveled to Barstow, California, some 435 miles distant, arriving there on Tuesday, December 14, at 3.20

A.M. They were rested in Barstow about twenty-three hours and were reloaded. *The two waybills (Plaintiff's Exhibits 17 and 18) demonstrate on their face that the destination point was Santa Rosa, California.* The animals departed Barstow, California, on Wednesday, December 15 at 2:10 A.M. and arrived in Sacramento on Thursday, December 16, at 10:30 A.M. They were unloaded in Sacramento after the elapse of thirty-two and a half hours from the time of leaving Barstow which is 412 miles in distance from Sacramento. They were reloaded in Sacramento on Saturday, December 18, at 4:30 P.M. in the same railway cars in which they had arrived and the certificate on the back of Plaintiff's Exhibit No. 17 indicates that the animals were receipted for in Santa Rosa on December 22, 1954.

Defendant's Exhibit "A", at page 13, reads in part as follows:

"Feeding, Resting and Watering Livestock.

Agents will make notation on waybill, whether carload or less-than-carload shipments, of day and hour livestock is loaded in cars.

The provisions of the laws with respect to resting, watering and feeding of livestock enroute, must be observed by conductors as well as agents and carried out, regardless of objection made by owner or his agent accompanying in charge; and the actual expense incurred by Southern Pacific Company (Pacific Lines) in effecting the resting, feeding and watering, as provided by law, will be added to the transportation charges and made collectible in the same manner. It will be the con-

ductors' duty to observe originating point and date and hour of loading, determining therefrom at what point rest will be necessary in order to conform to the law, and be guided accordingly."

SPECIFICATION OF ERRORS.

The appellant states, as his specifications of errors committed by the lower Court in this case, the following:

1. That the lower Court was without jurisdiction in this case and that appellant's motion to remand cause to the Superior Court of California should have been granted.³
2. The judgment is against the law in that the effect of said judgment provides that an owner of land is not required to exercise reasonable care in the use of his land so as to protect third parties from being injured by said use.
3. The judgment is against the law since the effect of said judgment is to provide that a common carrier, engaged in the transportation of livestock for hire, has no duty to exercise reasonable care to see that livestock held in said carrier's pens or corrals do not escape or otherwise injure third parties.
4. The judgment is against the law since the effect of said judgment is to provide that a common carrier, engaged in the transportation of livestock for hire, can delegate its duty to restrain said livestock in said carrier's pens or corrals, and by so delegating said duty, the said carrier is relieved of all liability to third

³This specification of error having been fully covered in the first portion of the brief.

parties for injuries suffered as a result of said livestock escaping from the carrier's corrals or pens.

5. The judgment is against the law since the effect of the judgment is to provide that a common carrier, engaged in the transportation of livestock for hire, can hold said livestock in said carrier's pens or corrals for rest and feed and/or trans-shipment, and that said carrier can absolve itself from any and all liability for injuries caused to third parties by said livestock by simply authorizing the consignee of the livestock to feed, water and restrain the animals.
6. The judgment is against the law since the effect of said judgment is to provide that a common carrier, engaged in the transportation of livestock for hire, can allow livestock, shipped by said carrier, to be placed in said carrier's corrals by the consignee and, even though said carrier has express knowledge that the consignee is not properly restraining said livestock, the carrier is not liable to members of the general public who are injured when said livestock escapes from the carrier's corrals or pens.
7. The Findings of Fact are not supported by the evidence.

ARGUMENT.**I. AN OWNER OF LAND IS REQUIRED TO EXERCISE REASONABLE CARE IN THE USE OF HIS LAND SO AS TO PROTECT THIRD PARTIES FROM BEING INJURED BY SAID USE.**

As a general principle of law the land owner or possessor of land owes certain affirmative duties of care with respect to activities or conditions maintained upon the land to persons who come upon the land or to persons who are injured outside of the land as a result of the conditions maintained upon the land. This general rule of law pertains also to third parties who are allowed to use the land of the owner. Restatement of Torts, Sec. 318, provides:

“If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so as to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor

(a) knows or has reason to know that he has the ability to control the third person, and

(b) knows or should know of the necessity and opportunity for exercising such control.”

It is submitted that all of the requirements of this section are met by the facts in the case before the Court. The land was owned and in the possession and control of Southern Pacific Company upon which was located the corrals and where the horses and mules were being fed. The defendant's agent, Mr. Anthony Perine, was present and he knew or should have

known that allowing fifty mules to be fed outside the corral along a public highway was such a hazard that he had the right to direct Mr. Coon to place the animals back in the Southern Pacific corrals or to remove them from the property of Southern Pacific Company. As the danger was apparent, he knew or should have known of the necessity and opportunity of exercising this control as an agent for the owner of the land.

In this regard the Court's attention is respectfully cited to the following cases applying the rule:

Honaman v. Philadelphia, 332 Penn. 535, 185 Atlantic 750;

Stevens v. Pittsburgh, 129 Penn. Super. 5, 198 Atlantic 655.

In other cases in which an owner of property or land allows another third party to use this land or property in such a way as said use is negligent, causing injuries, the courts have held that the owner of the land or property, as well as the third party who is negligent, are both jointly liable for such damage.

In *Porter v. Thompson*, 74 Cal. App. 2d 474, certain cattle were being auctioned on land and auctioneer yards owned by defendant. A cow jumped over a barrier into the lap of a spectator at the auction yard, injuring the plaintiff. The Court held that both the defendant owner of the land and the auctioneer had the joint duty to exercise reasonable care to see that proper fences and safeguards were provided to protect the public.

In *Pschomy v. Brooks Market*, 60 Cal. App. 2d 158, 140 Pac. 2d 431, and a subsequent decision in hearing said case in 79 Cal. App. 2d 556, 180 Pac. 2d 933, an owner of property was held liable for a use of the property by a prospective future tenant which use by said prospective tenant caused injury to a third party. In the *Pschomy* case the owner of the property was sued. He had permitted a future tenant of his property (someone who had not yet entered upon a lease and had not yet entered upon the property but was going to open a store on the property) to erect a sign upon the property. This was a small sign standing on an iron grill on the sidewalk with a circular ring in the bottom of the sign. A young lady walking along the sidewalk caught her foot in the iron grill work and fell and hurt herself, and filed suit against the owner of the property. The Court established the law that the owner of the property was liable for the negligent use of his property in that he had knowledge of the existence of the negligent conduct and failed to do anything to remedy the situation.

The Southern Pacific Company, through its agent and servant, Mr. Perine, knew that their property and corrals were being negligently used by Mr. Coon at 10:00 A.M. and 4:00 P.M. on the day that the animals escaped in that Mr. Perine saw that all 50 of the animals had been removed from the corral by Mr. Coon and were being fed outside of the corral along the public road. Mr. Perine, at 10 o'clock in the morning and at 4:00 P.M. in the afternoon of the day of the accident, observed this condition and did

nothing whatsoever to cause the danger to be removed by replacing the mules back in the corral. Under the doctrine of *Pschomy v. Brooks Market* both Southern Pacific Company and Mr. Coon would be liable for this negligent use of the property.

For similar holdings in other jurisdictions see *Conrad v. Cloves*, 93 Indiana 476, 47 Am. Rep. 388; *Smith v. Tennessee Railroad Association of St. Louis*, 160 Southwest 2d 476; also on this subject matter see 65 Corpus Juris Secundum, Negligence, Section 92.

It was stipulated in the record that Southern Pacific Company owned the land upon which the wood corral was located and owned the land adjacent to the corral and bordering upon E Street in Broderick, West Sacramento. The record demonstrated that their agents in charge of the corral had observed all of the mules and horses outside the corral and along E Street at both 10:00 A.M. and 4:00 P.M. on the day of the accident and within two hours thereafter the mules were on the West Sacramento freeway and were struck by the cars of Mr. Grigg and Mr. Spansel. Therefore, the agents of Southern Pacific knew that a dangerous condition had been created and was in existence upon their employer's property and that no steps of any kind were taken by said Southern Pacific employees to abate the dangerous condition by placing the mules back in the wooden corral. Further, upon learning of the escape of the mules, the Southern Pacific employees did go out and seek to round up and return the mules to the wooden corral and, in fact, the following morning succeeded in returning all of said

mules to the wooden corrals. Further, that the two mules that were killed were ordered sent to a reduction plant in the name of the Southern Pacific Company by Southern Pacific employees. Further, the stock record book of Southern Pacific Company demonstrates that an entry was made following the event, to the effect that the mules "had escaped from the corrals and got upon Highway 40".

It is submitted, therefore, that under the law herein stated the Southern Pacific Company as an owner of land allowed their land to be used with their express knowledge and consent in a dangerous manner and in result thereof fifty mules were allowed to escape and roam in the vicinity of streets and highways and did stray upon a freeway heavily traveled and did cause injury to not only the appellant herein but to other parties. That under the authorities herein cited this negligent conduct is chargeable to the Southern Pacific Company as well as to the third party who was knowingly allowed to use their land in such a fashion.

II. A COMMON CARRIER ENGAGED IN THE TRANSPORTATION OF LIVESTOCK FOR HIRE IS REQUIRED BY LAW TO MAINTAIN ADEQUATE FACILITIES AND CORRALS FOR THE HOUSING OF SAID ANIMALS SO AS TO PREVENT THEIR ESCAPE AND INJURY TO THIRD PARTIES.

Section 422 of the Agricultural Code of California provides that a common carrier who transports livestock for hire may not lawfully confine said livestock in cattle cars for more than thirty-six hours ". . . without unloading for rest, water and feeding into

properly equipped pens for a period of at least five hours”.

A similar statute exists in 45 U. S. Code Ann., Sections 71 and 72, requiring that said animals be transported not more than twenty-eight hours continuously and thereafter unloaded in properly equipped pens for rest, water and feeding.

In *Mering v. Southern Pacific Company*, 161 Cal. 297, it was provided that while an owner may agree to accompany livestock or care for them this does not relieve the railroad from providing adequate feed, water and properly equipped pens for their resting and feeding. Obviously implied in said decision is the further duty (which is a joint duty) to see that the animals are so properly secured in the pen as to prevent their escape and injury to the general public.

In 13 Corpus Juris Secundum, Carriers, Sec. 43, it is provided that the pens or corrals provided by common carriers for hire for the maintaining of livestock must be constructed and maintained in such a state of efficiency as is reasonably calculated to prevent animals from escaping therefrom and the failure to fulfill this duty in this regard will render the carrier liable for loss or injuries sustained thereby. See *Texas Railway Company v. Bigham*, 28 Southwestern 162, and *Texas & N.O.R. Company v. Lide*, 144 Southwestern 2d 685. In *Brook & Olson v. Payne*, 181 Northwestern 803, it was provided that this duty of maintaining adequate corrals for the prevention of the escape of the animals is imposed by law upon the railway company regardless of the fact that the ship-

per retains control and management of the stock until reloading is commenced.

Most cases which have arisen concerning the escape of livestock, involve a fact situation in which the owner of the livestock is suing the railroad company for damages to the animals caused by their escape. However, a collateral line of cases, together with the cases previously cited, indicate a duty of law upon a carrier for hire to prevent livestock in carriage from escaping and injuring third parties. The duty is not delegable.

A railroad is liable for negligence of third parties to whom it seeks to delegate the duty of operating its transportation facilities or any part thereof and this rule applies even though such delegation may be approved by the Interstate Commerce Commission. Thus the duty of safely corralling livestock is also not delegable.

The transportation of the animals in question was continuous transportation involving the operation of the corrals and the feeding and watering of the animals. This was an intrinsic part of the transportation process and one required by law both under the Agriculture Code of California and the U. S. Code. Thus liability existed as to that company for the damage occasioned by the escape of the animals.

It was said in 3 Shearman on Negligence, Section 447, that "*railroad companies have no power to lease their roads or delegate their public duties without express statutory authority; and therefore a company who attempts to do so remains liable for injuries suffered*

through the negligence of anyone operating any part of its road without its consent''.

The following cases have held a railroad liable where it is attempted to delegate its public duties:

Seay v. Southern Railway Company, 208 S.C. 171, 37 Southeastern 2d 535;

Los Angeles & S.L.R. Company v. Umbaugh, 61 Nevada 214, 123 Pac. 2d 224;

Missouri Pacific Railroad Company v. Newton, 205 Arkansas 353, 168 Southwestern 2d 812;

Clifford v. New York Central, 97 New York Supp. 954.

It has been held under 45 U.S. Code Ann., Section 72, that a carrier cannot by any contract with a shipper relieve itself of the duty of feeding and watering animals. (See *Southern Railway Company v. Prado*, 3 Alabama App. 413, 57 Southern 513.) It has also been held that it is the duty of a carrier to provide a place where stock can be cared for in all kinds of weather. (See *International E. G. N. Railway v. McRae*, 82 Texas 614, 18 Southwestern 672.)

In *Los Angeles & S. L. R. Company v. Umbaugh*, supra, it was held that the rule applied even when the Interstate Commerce Commission approved the delegation. The Agricultural Code and U.S. Code, which provides the duty of a railroad engaged in transporting livestock for hire to provide adequate pens and corrals, were obviously enacted to provide for the care of the animals and the preservation of the animals *and also were enacted to preserve and*

protect the general public from the animals brought into inhabited areas. Obviously, livestock pens and corrals are maintained by railroads in numerous cities and urban areas. To say that a railroad may bring into such cities and urban areas, or adjacent to main highways and thoroughfares, large numbers of livestock and upon arrival at said points that the railroad company has no further liability would be a construction so foreign to common sense as to render the purpose of the statutes ineffective and without purpose.

If a railroad company is being paid to transport large numbers of animals and livestock, it is obvious that they must maintain safe corrals for the holding of said livestock while in shipment or following termination of shipment so as to protect the public at large from the straying or wandering of said livestock.

If this Court is to apply the rule adopted by the lower Court in this case, then a railroad company can bring in large shipments of wild bulls and horses and deposit them at any place in the town and have no further liability therefor. Carrying the ruling of the lower Court to the ridiculous point, a shipper could have two carloads of Brahma bulls shipped with a terminal point of San Francisco. At that point the railroad company could open the doors of the boxcars, release the Brahma bulls upon the streets, and have no further liability, contending that as soon as they arrive at the terminal point of shipment the liability rests with the owner of the animals. Obviously, neither the federal nor the state legislatures intended any

such construction of the law, but intended that the railroad company would hold said livestock in safe pens and corrals pending their removal or reshipment therefrom or pending their trans-shipment or continuation of shipment to some other point.

III. A COMMON CARRIER TRANSPORTING LIVESTOCK FOR HIRE IS REQUIRED TO EXERCISE REASONABLE CARE WHILE SAID ANIMALS ARE IN THE PROCESS OF SAID CARRIAGE TO SEE THAT THEY DO NOT ESCAPE AND INJURE MEMBERS OF THE PUBLIC AT LARGE.

In this action there was a continuity of transit of the two carloads of mules from Texarkana, Texas, to Santa Rosa, California. (See Plaintiff's Exhibits Nos. 17 and 18 in evidence.) The defendant has sought to place great emphasis on the fact that the termination of the shipment occurred at Sacramento at the very moment the mules arrived at Sacramento and at that moment Southern Pacific was absolved from all further responsibilities for the animals. This contention has been answered in paragraphs I and II above.

The law is clear in this case, applying the facts herein, that there was a continuity of transport. The evidence demonstrates that (1) the animals were held for diversion; (2) that they were diverted on the same livestock contract and waybill upon which they arrived; (3) that the destination point on the waybills was Santa Rosa, California, and that no transportation charges were paid until the animals arrived in Santa Rosa; (4) no receipt or certificate was given

by the consignee of the animals for the animals until they had arrived at Santa Rosa; (5) that the boxcars on which the animals had originally been shipped from Texarkana were held in Sacramento at the corrals and subsequently the animals continued in transit from Sacramento in the same boxcars and arrived in Santa Rosa in the same boxcars, at which time the payment for freight was made and the animals receipted for; (6) that state and federal laws require periodic feeding and resting of the animals in transit in that said animals, under federal law, may not be transported for more than twenty-eight hours and, under state law, for more than thirty-six hours, without such rest and feeding; (7) that plaintiff's exhibits Nos. 17 and 18 demonstrate that the animals were last rested in Barstow, California, on December 15, leaving there at 2:10 a.m. and arriving in Sacramento on December 16, at 10:30 a.m. Thus, thirty-two hours had elapsed in the shipment from Barstow to Sacramento and, under federal and state laws, the animals had to be removed at Sacramento for rest and feeding.

The trial Court sought to block all such evidence as to the number of hours elapsing between the shipment from Barstow and arrival at Sacramento on the alleged grounds that the evidence was immaterial. In fact, the evidence was most material to establish that, under federal and state laws, the animals were removed at Sacramento to comply with state statutes of feeding and resting. Therefore, that the animals were in the care, custody and control of Southern Pacific Company for resting and feeding in compli-

ance with state and federal laws pending the continuation of shipment to Santa Rosa, California, pursuant to the waybills of lading.

To establish the fact that there was continuous transit of the animals, an examination of parallel cases under the Commerce clause of the Constitution involving taxing authority will be helpful to the Court. In *Philippine Refining Corporation v. Contra Costa*, 24 Cal. App. 2d 655, the plaintiff and taxpayer imported coconut oil, placing the oil in tanks in Contra Costa County; the oil was then broken down into smaller lots for shipment to purchasers. The question before the Court was whether the oil thus temporarily stored was subject to local taxation. It was held that “. . . the oil was held . . . *solely for a purpose incidental to the transportation* . . . and that such allegation shows continuity of transit . . .”

Obviously, the animals in this instance were held for a purpose incidental to transportation, that is to say, for rest and feeding pending the continuation of the trip to Santa Rosa and that there was, therefore, continuous transit. Being a continuous transit, the animals were in the care and custody and control of the common carrier that was transporting those animals for hire, Southern Pacific Company. That company was ultimately paid for the shipment at Santa Rosa, California, and a receipt for the animals was signed by the owner at Santa Rosa. Therefore, the animals which escaped from the Southern Pacific corrals at Sacramento, injuring the appellant, were under the care, custody and control of Southern Pacific

Company and they are therefore liable for the damages sustained by the appellant through the negligent care of the animals, and their subsequent escape.

Section 1714 of the Civil Code of California establishes responsibility for straying livestock. That section provides:

“Responsibility for willful acts, negligence, etc. Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the inquiry upon himself. The extent of liability in such cases is defined by the title on compensatory relief.”

In construing that section in *Jackson v. Hardy*, a 1945 case, decided in 70 Cal. App. 2d 6, the specific issue was raised as to whether that section applied to those who owned or possessed cattle. In *Jackson v. Hardy* the Court held that

“changed conditions compel adoption of a rule different from the common law rule. There is no reason for excepting cattle owners from the same duty applicable to other people to use ordinary care of skill in the management of their property. (Citing Civil Code, Sec. 1714.) It clearly appears from this decision that a cattle owner who negligently fails to keep his cattle from straying upon a highway may be held liable in a civil action for damages arising from a collision with his livestock even at a point where the highway is unfenced in open range country.”

The law of California is thus clear that, whether the highway is fenced or unfenced, under provisions of Section 1714 of the Civil Code, an owner or possessor of cattle or livestock is required to exercise reasonable care to prevent those animals from straying upon a highway and colliding with automobiles. In *Galeppi Bros. v. Bartlett*, 120 Fed. 2d 208, cattle escaped and were on the highway and were struck by plaintiff's car. The defendant sought to have the Agriculture Code, Section 423, construed to the effect that an owner of cattle no longer has a duty to exercise reasonable care to keep the animals off the highway. The Federal Court stated that the amendment to the Agriculture Code only abolished the doctrine of *res ipsa loquitor*, but that, if in fact the owner was negligent in allowing the animals to stray upon the highway, the owner would therefore be liable for any damages which might result. In the *Galeppi Bros.* case the language of *Jackson v. Hardy* was quoted.

Thus, under California law, an owner of livestock or a person who possesses livestock has a duty of care to prevent the livestock from straying upon a highway and causing injury, and that, if the owner or possessor of such animals is negligent in his care and custody of the livestock, he is liable for the damages occasioned by virtue of that negligence.

The defendant and the trial Court relied heavily upon the case of *Rutherford v. Reilly*, 104 Cal. App. 2d 629. Upon the basis of this case the trial Court found, and the defendant below maintained, that it had absolutely no duty of any kind or character to

maintain, possess or control the livestock in question so as to prevent the same from escaping and injuring the public at large. In the *Rutherford* case Mr. Reilly boarded his horse with the Sleepy Hollow Riding Academy; under his bailment and agreement he had the right to take the horse out of the barn at any time. On one occasion, while he was removing his horse from the barn for the purpose of riding said horse, the horse was frightened and escaped from him, got onto a highway and was struck. The Court held that Reilly was liable as the owner of the horse and in control of the horse at the time it escaped, but that there would be no liability on the bailee with whom the horse had been boarded. The Court found as follows;

“... it is plain that Reilly was entitled to exclusive possession of the horse from the moment he opened the stable door and that the position of the academy as bailee thereupon ceased”.

It is presumptively the position of the defendant and the lower Court that the defendant was powerless to exercise any control over the livestock being held on its property and in its corrals. It is hornbook law that the land owner has control and authority in such a situation. It has been stated in Prosser on Torts, Hornbook Series, page 608, that the land owner's possession and control of his land gives him a power of control over the conduct of those whom he allows to enter upon it and which control he is required to exercise for the protection of those outside. Thus, Mr. Perine, in charge of the Southern Pacific corral and

an employee of the Southern Pacific Company, had the authority and power to require Mr. Coon to return the horses and mules to the inside wooden corral at 10:00 a.m. and 4:00 p.m. on the day of the accident, when he personally observed all of the animals outside the corral, adjacent to a public road, and in the control of only one person. It was not only the right but the duty of Mr. Perine, in order to protect the public at large, to require that the horses and mules be returned to the wooden corral or order Mr. Coon to remove all of the animals from the land owned by Southern Pacific Company.

The *Rutherford* case is not in point, being distinguished on *two* grounds. First, the *Rutherford* case did not involve the question of a nondelegable duty of a railroad but involved only the duty of a stable-keeper bailee. Secondly, the question of negligent permissive use (Restatement of Torts, Sec. 318) was not an issue in the *Rutherford* case, since there was no showing in the *Rutherford* case that the stable-keeper had *knowledge* of the horse owner's negligence in removing the horse from the stable. In the case at bar, however, the evidence clearly demonstrated that a Southern Pacific employee observed the mules being fed outside of the corrals (on Southern Pacific land) along a public road and that said employee did nothing to cause the mules to be returned to the corrals where they could be safely held in restraint.

In the case at bar, 55 horses and mules were being transported for hire by a common carrier which is re-

quired by law to maintain adequate corrals and fences and to feed, water and rest the animals periodically. Said animals were in the process of being shipped from Texarkana, Texas, to Santa Rosa, California. That the said animals were being held in the pens and corrals of the Southern Pacific Company as an incident to their transportation. That the animals had been in constant transit from Barstow, California, to Sacramento, California for 32 hours previous to their being unloaded in Sacramento, and, under existing federal and state laws, they were required to be unloaded in Sacramento and to be fed, watered and rested by the railroad company. *That the duty of transportation and resting and feeding of said livestock was a nondelegable duty of the railroad, regardless of whether the owner assisted in this capacity. The animals escaped from the corrals and upon the public highway while under the care, custody and control and while being in the process of shipment by the defendant railroad company. That no freight was paid nor was a receipt given for the animals until they had arrived at Santa Rosa, California.*

It is submitted that the fact situation existing in the case at bar is entirely distinct and the duties of law are entirely distinct from the fact situation existing in *Rutherford v. Reilly*.

IV. THE FINDINGS OF FACT ARE UNSUPPORTED BY THE EVIDENCE.

Paragraph III of the Findings of Fact (Trans. of Rec. p. 45) provides in part as follows:

“ . . . and at all times mentioned in this action, said stock corral was constructed and maintained with reasonable care.”

This finding of fact is not supported by any evidence. Mr. Perine, the Southern Pacific employee assigned to the corral, testified that a two-strand and, in some places, a one-strand wire fence had been strung on the Southern Pacific land outside the corral but within the area in which the 55 horses and mules were being fed on the day of the accident. The testimony of Mr. Perine demonstrated that said fence was sagging and was not adequate.

Mr. Sigmund A. Fisher, the freight agent of Southern Pacific Company, in Sacramento and the person directly charged with the responsibility for the maintenance of the corral, testified that the inadequate wire fence outside of the wooden corral, on the Southern Pacific land and within which enclosure the animals were being fed on the day they escaped, had existed on the Southern Pacific land for some five years and was an inadequate fence and did sag in places, and that animals could escape therefrom.

Mr. Don Courtney, who resided in the area and was familiar with the corrals, testified in detail as to the one- and two-wire strand fence on Southern Pacific Company's land and the fact that said fence was inadequate, sagged in places and animals could escape therefrom. Mr. Courtney testified that the animals were held within this inadequate enclosure the day that they escaped.

Officer George Houck testified that his inspection of the Southern Pacific corral the day following the accident disclosed a skimpy, inadequate wire enclosure with the wires sagging.

The evidence of the Southern Pacific employees, of the independent witness, Mr. Courtney, of the independent witness, Officer Houck, all demonstrate that the corral wire enclosure maintained by the Southern Pacific on its land for more than five years and within which area the animals were being fed the day of their escape, was wholly inadequate, sagging and could easily be negotiated by the horses and mules that wished to escape. Therefore, finding No. III is not supported by the evidence.

Finding No. IV (Trans. of Rec. p. 45), is not supported by the evidence. That finding provides that the mules were consigned to Sacramento, California. Plaintiff's exhibits Nos. 17 and 18 conclusively demonstrate on the face thereof that the animals were consigned for shipment to Santa Rosa and that said animals were receipted for in Santa Rosa. The consignee did not receipt for the animals in Sacramento. Further, the testimony of Sigmund Fisher, freight agent of Southern Pacific Company, demonstrates that the freight was paid through to Santa Rosa.

It is submitted, therefore, on the face of the waybills of lading (plaintiff's exhibits Nos. 17 and 18) that finding No. IV is not supported by the evidence.

Finding No. V is similarly unsupported by the evidence upon the same grounds and reasons assigned to finding No. IV.

Finding No. VI is not supported by the evidence in that it provides that H. S. Coon was the owner of said animals and further provides that Mr. Coon had exclusive custody of and possession of the animals. Further, the finding is not supported by the evidence in that it provides that, until 4:30 p.m. on December 18, 1954, Southern Pacific Company had no possession and/or control of said horses and mules but that, to the contrary, the sole and exclusive care, custody and control, ownership and maintenance was with the owner, to-wit, H. L. Coon. Finding No. VI is not supported by the evidence since the waybills of lading and the uniform livestock agreement definitely establish that the animals were owned by Charles Owens and were consigned to H. L. Coon, and were being transported by the Southern Pacific Company. A finding which provides that Mr. Coon took sole and exclusive custody and possession thereof is not supported by the evidence. Upon arrival of the animals in Sacramento, pending further shipment to Santa Rosa, Southern Pacific employees assisted in the unloading thereof, a counting of the animals, and did, on two occasions the following day, go to the corrals to observe the animals and see to their needs. That, when knowledge that the animals had escaped came to the attention of Southern Pacific Company, they dispatched employees to assist in rounding up the animals and returning same to the corrals of the Southern Pacific Company. That the mules which were killed in the accident were ordered by Southern Pacific employees to a reduction plant in the name of Southern Pacific Company. That freight charges were

charged on the animals for continuous shipment from Texarkana, Texas, to Santa Rosa, California. That a receipt for the delivery of said animals was not given until the animals arrived in Santa Rosa, California. The said finding No. VI is likewise contrary to law in that, as a matter of law the Southern Pacific Company possessed and controlled said animals both as a common carrier transporting said animals for hire and as the owner of land upon which the said animals were being held.

Finding No. VII (Trans. of Rec., p. 46) is not supported by the evidence in that it provides that the mules were in the exclusive care, custody and control of Coon and that the defendant Southern Pacific Company was not negligent in any way concerning the escape of said animals. This finding is not supported by the evidence in that it conclusively was demonstrated by the testimony of Anthony Perine, that he had, on the day of the accident, observed the animals being fed outside the wooden corrals on Southern Pacific land within a wire enclosure that was wholly inadequate and which sagged. That he took no steps of any kind to see that the animals were returned to the corral and that he had further knowledge of their being negligently held on the land of the Southern Pacific Company within two hours of the happening of the accident. That the failure of Southern Pacific employees to correct this negligent care of the animals on Southern Pacific land within two hours of the happening of the accident, (having express knowledge that the wire enclosure was inadequate to restrain the animals) is sufficient evidence of

negligence on the part of the Southern Pacific Company to render finding No. VII erroneous.

It is submitted for the reasons hereinabove assigned and upon the basis of the law previously stated that the Findings of Fact herein specified are not supported by the evidence, nor are they supported by the legal duty imposed upon a common carrier or upon an owner of land.

It is respectfully submitted that the decision of the lower Court is void for the reasons that no jurisdiction existed in said Court to try this cause and that this Court is respectfully urged to remand the cause to the District Court with an order to remand same to the Superior Court of the State of California. Further, it is respectfully urged that, if jurisdiction is found to have existed, that the decision of the lower Court should be reversed on the grounds that it is erroneous as a matter of law and that the Findings of Fact are not supported by the evidence. That this Court declare that liability exists on the part of Southern Pacific Company and remand the case with instructions to try the case on the sole issue of damages sustained by plaintiff.

Dated, San Francisco, California,
January 8, 1957.

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No. 15,220

In the
United States Court of Appeals
For the Ninth Circuit

GLEN EARL GRIGG,

Appellant,

VS.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellee.

Appeal from Judgment of the United States District Court for the
Northern District of California, Northern Division

Honorable SHERRILL HALBERT, Judge

Appellee's Brief

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FILED

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No. 15,220

In the
United States Court of Appeals
For the Ninth Circuit

GLEN EARL GRIGG,

Appellant.

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellee.

Appeal from Judgment of the United States District Court for the
Northern District of California, Northern Division

Honorable SHERRILL HALBERT, Judge

Appellee's Brief

I.

**THIS ACTION WAS PROPERLY REMOVED FROM THE STATE
COURT TO THE UNITED STATES DISTRICT COURT**

The complaint (R 9-14) alleges that the defendants are Harver Coon Gendel, Southern Pacific Company, a corporation, and "First Doe to Sixth Doe, Inclusive". It expressly postpones any charge against the Does. It does charge that Gendel and the Southern Pacific Company "were so negligent, careless and reckless in their care, custody and con-

trol, ownership and maintenance of said horses and mules as to allow said animals to stray or come upon said park overpass on U.S. Highway 40". The complaint further avers that the defendant Harver Coon Gendel is a resident of and domiciled in the State of California and that the defendant Southern Pacific Company is a corporation of the State of Delaware. Neither residence nor domicile is ascribed to the Does. The complaint thus charges a joint tort against the two named defendants and the cause is not removable on its face.

Appellant set the case for trial after the single appearance of the defendant Southern Pacific Company. On November 15, 1955, when the case was called for trial, the appellant announced that he was ready for trial as against the defendant Southern Pacific Company alone without service of summons and complaint upon the named resident defendants or upon the Does. At this point, the Judge of the state court asked the attorneys for appellant what disposition they were going to make of the defendant Gendel, and they responded with motion for dismissal without prejudice, which was granted (R 30, 31). The appellee Southern Pacific Company then stated to the court that the cause had become removable for the first time, that it would immediately file a petition in the United States District Court for such removal, upon the ground that by said election and dismissal, the appellant voluntarily eliminated from the case the sole resident defendant, to-wit, defendant Gendel, and elected to proceed to trial against the non-resident defendant (Southern Pacific Company) alone. This position was upheld on appellant's motion to remand.

It is well settled that if the plaintiff voluntarily dismisses, discontinues, or in any way abandons the action as to the resident joint defendant, the cause then becomes removable,

and may, upon prompt action, be removed by the nonresident defendants who have been served. See *Stamm v. American Tel. & Tel. Co.*, 129 F. Supp. 719, 721, and the cases therein cited.

This question under similar facts was before this Honorable Court in *Southern Pacific Company v. Haight*, 126 Fed. (2d) 900. In that case the plaintiff sued the Southern Pacific Company and two fictitiously named operating employees of said company, who were alleged to be residents of California, and charged joint negligence against all of said defendants. When the case was called for trial, the plaintiff announced herself as ready for trial without service of summons and complaint upon said fictitiously named defendants (employees), and voluntarily elected to proceed with the trial of the case against the Southern Pacific Company alone. The defendant Southern Pacific Company immediately asserted that such election amounted to a complete severance of the action as to it and secured removal to the District Court. The facts in the *Haight* case are identical to the facts in the case at bar, with the exception that here the Does were not charged, and in addition to the election to proceed to trial against the non-resident defendants alone, the appellant here formally dismissed as to the defendant Gendel. This court held that the *Haight* case was properly removed, and in adopting the rule of *Berry v. St. Louis & S. F. R. Co.*, 118 Fed. 911, stated at page 904:

“It is our opinion and we hold that the rule of the *Berry* case, *supra*, is sound, and that the plaintiff in the instant case having petitioned the court to set the case for trial and having announced that she was ready to proceed with the trial against the Southern Pacific Company, each at a time when only the latter defendant had been brought into court, had abandoned the joint character of her action, and rendered the cause immediately removable to the District Court.”

Since the appellant in the case at bar announced that he was ready to proceed with the trial against the appellee, at a time when only the latter had been brought into court, he voluntarily abandoned the joint character of his action which in itself rendered the cause immediately removable. The subsequent dismissal of the defendant Gendel added nothing to the case's removability, as removability pre-existed the dismissal.

Appellant contends that the case was improperly removed for the reason that the petition for removal was premised upon the ground that the appellant dismissed as against all resident defendants, and he dismissed as to the defendant Gendel only, leaving the action still pending against the fictitious defendants. In the first place, the appellant misconstrues the petition for removal. It does not aver that appellant dismissed as to the fictitious defendants but quotes Paragraph II of the complaint to show that there was no cause of action stated. The petition also states that no person was served as a Doe and that there had been no appearance by anyone other than the defendant Southern Pacific Company. Paragraph VI of the petition states that on November 15, 1955, said action came on for trial in the state court upon the plaintiff's complaint and the answer of the defendant Southern Pacific Company, and at that time plaintiff "voluntarily dismissed said action as to *all defendants therein*, except as to the defendant Southern Pacific Company", and that after such dismissal "said action involved * * * a controversy wholly between citizens of different states".

We submit that the petition is subject to but one construction; that is, since the complaint does not state a cause of action against the Does, the dismissal as to defendant Gendel was a dismissal "as against *all defendants therein*

except defendant Southern Pacific Company." Therefore, the case was properly removed on the ground set forth in said petition. This question was before this Honorable Court in *Thiel v. Southern Pacific Company*, 126 Fed. (2d) 710.

In the *Thiel* case, the complaint set forth Southern Pacific Company and "First Doe, Second Doe, and Third Doe" as defendants. The complaint also alleged that one of the railroad company's special police and other of its agents were guilty of specific negligence and that its conductor was also guilty of acts of negligence. The case was removed by the railroad company on the ground of diversity of citizenship. The plaintiff contended that the District Court had no such jurisdiction because of the Does. In rejecting the appellant's contention this Honorable Court stated, at page 711 :

"* * * Appellant nevertheless contends that this is not a suit of which the district courts of the United States are given jurisdiction, because, says appellant, the controversy is not wholly between citizens of different States. In support of his contention, appellant points to the caption of his complaint, which names as defendants not only appellee, but also 'First Doe, Second Doe and Third Doe.'

"Appellant's contention must be rejected; for, although the Does are named as defendants in the caption of the complaint, the complaint states no cause of action—no claim upon which relief can be granted—against the Does or either of them. It not only fails to show who the Does are, but also fails to show any relationship whatever between the Does and appellant or between the Does and appellee, or that any legal duty was ever owed by the Does to appellant. Much less does it show that such duty was breached.

* * * * *

"The complaint does not give the names of the officers, agents or conductors mentioned therein, nor does

it identify or attempt to identify any of them with any of the Does. In so far as it refers to the Does, the statement that 'said defendants * * * accepted [appellant] as a passenger and then * * * failed to take any reasonable precautions for his safety' is meaningless; for it does not appear that the Does were carriers or agents or employees of carriers, or had anything to do with the acceptance or rejection of passengers, or owed any duty whatever to appellant. The characterization of their conduct as 'careless and reckless' merely expresses a conclusion of the pleader—a conclusion which the pleaded facts do not warrant.

* * * * *

"After the suit was removed, appellant moved the District Court for leave to amend his complaint so as to name as defendants, in the place of First Doe and Second Doe, Frank Elton Cosgrove and Otto Sorenson, citizens of California, and so as to state (or attempt to state) a cause of action against them; appellant being under the delusion that he could thereby defeat the District Court's jurisdiction and compel a remand of the suit to the State court. The proposed amended complaint and the motion for leave to file it are included in the record on this appeal, but may not be considered by us in determining whether the suit was removable; for that question must 'be determined according to [appellant's] pleading at the time of the petition for removal.' *Pullman Co. v. Jenkins*, 305 U.S. 534, 537, 59 St. Ct. 347, 349, 83 L.Ed. 334."

The *Thiel* case was followed in *Ronson Art Metal Works v. Hilton Lite Corp.*, 111 F.Supp. 691, where a similar contention was made. In this case a non-resident defendant, one Hubbard, was actually served as a Doe, and a point arose on plaintiff's motion to remand as to whether the petition for removal, which had not been joined in by Hubbard until long after it was filed, was defective under the rule requir-

ing all defendants to join in the petition. The court stated as follows at page 694:

"Nowhere in the complaint is Hubbard mentioned by name as a defendant. The complaint alleges that plaintiff does not know the true names of the defendants Does I to V, inclusive, and therefore sues them under said fictitious names; *plaintiff prays that their true names may be inserted therein upon ascertainment, together with appropriate charging allegations.*

"* * * On September 4, 1952, all persons who were named as defendants joined in the petition for removal. On that date, there were no other known defendants from any examination of the record. *The complaint not only did not give the true names of the Does, but stated affirmatively in effect that it had not charged the Doe defendants in the complaint, and permission would be sought at a later time to charge them.*

"As stated in *Thiel v. Southern Pacific Co.*, 9 Cir. 1942, 126 F.2d 710, 711, 'although the Does are named as defendants in the caption of the complaint, the complaint states no cause of action—no claim upon which relief can be granted—against the Does or either of them. It not only fails to show who the Does are, but also fails to show any relationship whatever between the Does and appellant or between the Does and appellee, or that any legal duty was ever owed by the Does to appellant. Much less does it show that such duty was breached. * * * No cause of action having been stated against the Does, they must be disregarded in determining whether the suit was removable.' I find that the failure of Hubbard to join in the original petition for removal under all the circumstances of this case does not make it necessary that the motion to remand be granted." (Emphasis added.)

Even if the law were otherwise, the case should not have been remanded for the reason that the petition showed on

its face ample facts to support the removal on the *Haight* case theory that the appellant had abandoned the joint character of the action by his announcement or election to proceed to trial against the Southern Pacific Company alone, without service upon the Does (R 21, 28, 33, 35, 37). The District Court was not confined to the allegations of the petition for removal, if the record otherwise disclosed a case over which it had jurisdiction. In *Ellis v. Davis*, 4 F.2d 323, the cause was removed to the Federal Court upon a petition stating that the cause arose under the constitution and the laws of the United States. On motion for a remand it was shown that the moving defendant was in error as to that ground but, since the plaintiff's petition showed diversity of citizenship, the motion to remand was properly denied. At page 323 the court stated:

“* * * The court is not confined to the allegations of the petition for removal, if the record otherwise discloses a case of which the federal court has jurisdiction.”

Ellis v. Davis, *supra*, was cited in *Doggett v. Hunt*, 93 F. Supp. 426, where on motion to remand the court held that any deficiency in the allegation for the petition for removal concerning the jurisdictional amount was cured by the allegations of the plaintiff's complaint which was attached to the petition.

Therefore, whether or not the complaint of appellant stated a cause of action against the fictitious defendants, the cause became removable when plaintiff elected to proceed to trial against the Southern Pacific Company alone and the petition sufficiently stated that fact.

Lastly, it is contended by appellant that the appellee did not make a timely petition for removal and further submitted itself to the jurisdiction of the state court and

hence was estopped to remove the case to the federal court. This contention is apparently based upon the allegations set forth in the affidavit of Charles J. Miller (supporting motion to remand cause) in which it is set forth that the Southern Pacific Company was orally notified more than thirty days prior to the trial date that a dismissal would be entered as to the defendant Gendel and, further, that prior to the entry of said dismissal the Southern Pacific Company had subjected itself to the jurisdiction of the state court "by numerous stipulations and occurrences." In this contention the appellant overlooks that the cause did not become removable until immediately following plaintiff's said election to proceed to trial (or until the actual entry of said dismissal) against appellee.

This precise point was before this Honorable Court in *Southern Pacific Company v. Haight*, *supra*, where the plaintiff argued in the District Court, in seeking a remand, that the petition to remove was not timely as it should have been made at least immediately after the service of the memorandum to set cause for trial. This court disposed of this contention by holding that so long as it does not appear of record that the case is removable, no one can remove it, and that the case was not removable at the time of the service of the motion to set the case for trial for the reason that the plaintiff did not move for the severance of the joint cause of action until the case was called for trial.

Further, since the rendition of the *Haight* case, Section 1446 of Title 28 U.S.C.A., has been adopted and this section in part provides:

"If the case stated by the initial pleading is not removable, a petition for removal *may be filed within twenty days* after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first

be ascertained that the case is one which is or has become removable.” (Emphasis added.)

The first “motion, order or paper from which it may first be ascertained” that this case had become removable was the appellant’s announcement in open court that he would proceed to trial against the Southern Pacific Company alone and his motion to dismiss defendant Gendel. Attempted removal in advance of that would have been premature. *Houpburg v. Kansas City Stockyards Co.*, 114 F. Supp. 659; *Stamm v. American Tel. & Tel. Co.*, *supra*, 129 F. Supp. 719. Since the right did not exist at the time of the facts urged by appellant, it could not have been waived by appellee.

II.

STATEMENT OF THE CASE

(A) The Issue Upon Which the Cause Was Tried.

As shown heretofore, the complaint charges the following specific negligence:

“* * * the said defendants, and each of them, owned, possessed and controlled, and has (sic) in their sole care and custody certain mules or horses in the immediate vicinity of said Park Overpass, U. S. Highway 40, approximately one mile west of Sacramento, California, and were so negligent, careless and reckless in their said care, custody and control, ownership and maintenance of said horses and mules as to allow said animals to stray or come upon the said Park Overpass on U. S. Highway 40 and into and upon the main traveled portion of said highway, and into the path of the plaintiff’s oncoming car, * * *”. (R 11)

The answer of the defendant Southern Pacific Company denies this specific charge of negligence. The case proceeded to trial before the District Court upon that issue. Thereafter

the case was submitted and the Honorable Judge found for appellee, stating, "I find that the animals in question were outside the control, custody or ownership of the defendant Southern Pacific Company and were in truth and in fact in the custody, control and ownership of the consignee * * *." (R 380)

After judgment appellant sought an order granting leave to file an amended complaint purportedly to conform to the evidence.¹ By this method the appellant endeavored to abandon his initial charge of negligence and adopt a new one, to-wit, that the defendant Southern Pacific Company negligently and carelessly allowed and permitted its consignee, Mr. Coon (improperly sued as Harver Coon Gendel), to use its premises in a dangerous and careless manner, or, specifically, that having permitted Coon to use its wooden corrals, when it saw that Coon was feeding his mules and horses outside said wooden corral, the Southern Pacific Company should have directed him to place the animals back in the corrals or to remove them from its property. This belated theory is entirely beyond the issues and the District Court properly denied appellant's motion to amend its complaint to set forth this new and different cause of action.

(B) Statement of Facts.

In view of the fact that the appellant's general statement of the evidence is incomplete, inaccurate and is stated for the purpose of finding support for a new and different cause of action than that upon which the case was tried, it is necessary to restate the facts briefly:

On the 9th day of December, 1954, one Haas Owens shipped on the Texas Pacific at Texarkansas, Texas, two

1. The record does not set forth a copy of the notice of motion to amend the complaint to conform to the evidence but a copy of the order denying such motion appears in the record (R 52).

carloads of horses and mules consigned to Coon at Sacramento, California, pursuant to a certain uniform livestock contract, specifically providing that the shipper will load and unload the animals at his own risk and expense (R 362). These two carloads were delivered to the Southern Pacific Company at Bakersfield, California, for carriage by it to Sacramento, California. They arrived at the corrals of the Southern Pacific Company, West Sacramento, California, on December 16, 1954, at 10:00 o'clock A.M. Upon their arrival, Coon, the owner thereof (R 150) took possession of the horses and mules and unloaded them into the wooden corrals. Mr. Anthony Perine (the industrial clerk (R 133)), whose duties are to tag and seal cars and also to inspect and count livestock upon arrival and departure and also to water and feed stock when it is the carrier's obligation to do so, was not in charge of the corrals as stated on page 15 of the appellant's brief. Mr. Sigmund A. Fisher, Freight Agent, is in charge of the corrals (R 281). Mr. Perine arrived at the corrals at 10:30 o'clock A.M. and found that Coon had unloaded one car and was unloading the second. He remained there for about ten or fifteen minutes, inspected them and counted them after they were confined in the corral (R 116, 121). Perine did not in any way assist Coon in the unloading since he had taken complete charge of them (R 117, 121). In other words, Coon "took care of everything—Perine just counted the horses and mules" (R 139). Mr. Fisher, the Freight Agent, also testified to the same effect (R 311-312). Coon also fed and watered his own animals (R 314).

After a shipment of livestock arrives at its destination, the consignee has twenty days in which to divert it to a new point of destination at the through rate, and if the same is not diverted within that time limit the full local rate from destination to diversion point will be assessed (R 310).

When this shipment arrived in West Sacramento, the Southern Pacific Company did not know what Coon was going to do with that shipment, that is, whether it would remain in Sacramento or be later diverted (R 313).

These wooden corrals were maintained in West Sacramento for the loading, unloading, feeding, watering and resting of livestock, and are inspected periodically by Mr. Fisher and repaired if required (R 282). No charge to the shipper or consignee is made for the use of the corrals at the point of destination but is a part of the service (R 316). At the time in question these wooden corrals were in good condition (R 254).

Outside the corrals there was a partial old fence with two strands of wire (R 257-259). This did not enclose any area, but the shipper Coon had strung one strand of wire for about one-third of the distance of the two-wire fence in order to make an enclosure (R 258, 259); "just to hold stock in there if they were watched" (R 257). This makeshift partial fence was not maintained by the Southern Pacific Company for shippers' use or otherwise, and no authority was given to anyone by the Company to use it (R 316). It was a temporary fencing, devised by Coon for these horses and mules.

While Mr. Perine was off duty (R 127) (he was on duty from 4:00 P.M. to midnight) he was going to his mother's home at 10:00 A.M. on December 17, 1954, (R 128) and he passed the corrals and observed the mules and horses grazing all through the area immediately outside the wooden corrals and Coon was there watching them (R 126, 127). Mr. Perine merely said "Hello" to Mr. Coon and went on his way. At about 3:45 P.M. on the same day Mr. Perine left his mother's home and again passed the corral and again saw Coon and the horses and mules were in the same general

location. At this time he had no conversation with Mr. Coon (R 128). Mr. Perine made no report to his employer about these animals being fed outside the corral (R 133).

The exact time the mules and horses strayed upon the freeway some $1\frac{1}{2}$ or 2 miles distant (R 160) is not revealed by the record. The record does show, however, that at approximately 5:30 P.M. George Houcke, a California Highway Patrolman, received a call that there were horses on the freeway in the vicinity of Riske's Overpass, U. S. Highway 40 Freeway (R 156) and the accident occurred shortly after said officer arrived at the scene. No diversion order changing the destination of the shipment from Sacramento was received until 4:00 P.M. on December 18 (R 294), almost a full day after the accident occurred.

Based upon the foregoing facts the trial court found that the exclusive custody, control and ownership of the horses and mules were in the consignee, Mr. Coon, and that the defendant Southern Pacific Company was free of negligence in the matter.

(C) Argument.

1. THE FINDING AS TO POSSESSION AND CONTROL OF THE HORSES AND MULES IS FULLY SUPPORTED BY THE EVIDENCE.

The trial court found that between the time Mr. Coon started to unload the animals and the time of the diversion order the defendant Southern Pacific Company had no possession or control of said horses or mules, and their sole and exclusive care, custody, ownership and/or maintenance was with said H. L. Coon. The court therefore held that the allegations of the complaint were unsubstantiated as to appellee. The evidence warrants and supports said finding, in that the evidence shows that Coon voluntarily proceeded to unload his said livestock pursuant to the provisions of the livestock contract, watered, fed them, and took exclusive

custody and control thereof. Further, the evidence shows that the Southern Pacific Company did nothing relative to these animals whatsoever other than to count them and inspect them when they arrived in Sacramento. This conduct of the Southern Pacific Company took ten to fifteen minutes and thereafter it did nothing relative to the horses and mules, but they remained in the possession, control and custody of H. L. Coon. The corrals were in good condition.

The appellant makes much ado as to whether or not the shipment had arrived at its destination or whether the same was in transit at the time of the accident (on the evening of December 17, 1954). The fact is that at the time of the accident the shipment had arrived at its destination pursuant to the contract as it stood then. However, the argument seems pointless for even if the livestock shipment had stopped in Sacramento in transit for the purpose of feeding, watering and resting as contended by the appellant, then the matter of custody and control be unaltered. Page 13 B of Applicable Tariffs 188-G provides:

“Rules and regulations indicating charge governing ownership, sorting and/or consolidating in transit of livestock at Roseville, Sacramento, San Francisco and Stockton, California, rules and regulations * * *:

“The custody and possession of livestock while feeding, watering, resting, sorting and/or consolidation shall be that of the owner and not the carrier.” (Defendants’ Exhibit A, R 311)

The trial court’s finding is strongly supported by the decision of *Rutherford v. Reilly*, 104 Cal. App. (2d) 629, 232 P.2d 34. In this case the question was whether the operator of a boarding stable for horses was liable for injuries caused by a horse which escaped from its box stall while its owner was in the act of placing a halter on it preparatory to

exercising the horse. The defendant Reilly owned a horse which he boarded at the defendant's stables with the provision that at any time he could go directly to the stable and procure his horse for any purpose he chose, among other things for exercising it on the riding ring at the stable. On the occasion in question, Reilly went directly to the stall carrying a halter and a 50 foot "lunge" rope, his purpose being to exercise the horse on the premises. When Reilly opened the door of the stall the horse bolted the open door and ran into the street. The foreman of the stable and Reilly pursued the horse which tended to excite him and the horse collided with an automobile driven by plaintiff, with resultant injuries. The trial court held that the possession of the horse was controlled by the two defendants and that both defendants negligently permitted the aforesaid horse to escape from the stable. In reversing the lower court, the court on page 630 stated:

"On the facts narrated it is plain that Reilly was entitled to and was in exclusive possession of the horse from the moment he opened the stable door and that the possession of the academy as bailee thereupon ceased. The court's finding to the contrary is not supported by the evidence. The horse escaped from the stall through the act of Reilly and through no act of the academy, negligent or otherwise. * * *

"From what has been said it is apparent that no legal liability of the academy was shown for the injuries sustained by plaintiff, and hence we do not discuss other errors assigned."

The *Rutherford* case is decisive of the case at bar. The rights and obligations between the Railroad Company and the shipper of livestock are governed by the uniform livestock contract, and applicable tariffs. Under the livestock contract the shipper at his own risk and expense will load

and unload the animals. Once unloaded, Coon was obligated to and did assume full custody and control of the animals. The company had no duty or obligation until after the diversion order was delivered and the shipper had reloaded the livestock into the cars. If Reilly had the possession and control of his horse as soon as he opened the stall door, likewise Coon had the control of the horses and mules as soon as he commenced to unload the same and particularly on the next day when he let them out of the corrals to be fed and grazed immediately outside the corrals. Therefore, Coon, like Reilly, "was entitled to and was in exclusive possession * * * from the moment he opened the stable [corral gate] door and the possession of the academy [or the railroad] as the bailee thereupon ceased". If the Railroad Company never assumed the control and possession of the livestock but merely determined that the owner Coon had done so, no negligence could be premised upon "their care, custody and control, ownership and maintenance of said horses and mules" as to allow said horses to stray. Therefore, there was ample evidence to support the judgment and, like the *Rutherford* case, there can be no legal liability of the Railroad Company when its possession and control had ceased about two days prior to the straying of the animals.

2. NO NEGLIGENCE CAN BE PREMISED ON THE ACT OF ANTHONY PERINE IN SEEING THE ANIMALS OUTSIDE THE CORRALS UNDER THE CARE OF THEIR OWNER, COON.

Under this heading the appellant has deviated entirely from the issue made by the pleadings and upon which the case was tried. Now it seems to be conceded that Mr. Coon had possession and custody of the horses and mules but was handling them in a dangerous manner. With this background appellant contends that the defendant Southern Pacific Company's agent, Anthony Perine, was present and knew

or should have known that allowing 50 horses and mules to be fed outside the corrals in the vicinity of a public street was such a hazard that he had the duty to direct Mr. Coon to place the animals back in the Southern Pacific Company corrals or to remove them from the property of the Southern Pacific Company and his failure to do so was negligence, which was imputed to the appellee.

Our discussion under this heading is premised solely upon the assumption that under some hypothesis appellant's contention hereunder may be within the issues and is done solely because we desire to answer every point made by the appellant in his said brief.

In the first place the appellant has overlooked that the court found by its finding No. 7 (R 46) that H. L. Coon negligently and carelessly permitted or allowed said horses and mules to stray upon said parkway overpass on said U. S. Highway 40 "without any participating act or omission by the defendant Southern Pacific Company" and, therefore, if there is any fact supporting this finding, the District Court's opinion must be affirmed.

Plaintiff's witness, Don Courtney, testified that the wooden corrals were in good condition and that they had always held livestock (R 254) and the horses and mules were let out of the corrals into a makeshift wire enclosure². The witness Courtney further testified that "Mr. Coon and Tex stretched one extra wire across the—I would say the length of this room—*just to hold stock in there if they were watched*" (R 256, 257). It was further shown that Coon was a good livestock man (R 163). On this record the District Court was eminently entitled to find that appellant had not proved that Perine knew or should have known of any risk, reasonable or otherwise, of the stock's escaping.

2. The enclosure was made by Coon adding one wire strand for one-third of its length (R 259, 262).

Further, there was no evidence that the Southern Pacific Company permitted Mr. Coon to use this area of its property. The evidence in this regard was to the contrary in that Mr. Fisher testified that the makeshift fence was not maintained by the Southern Pacific Company for shippers' use nor had he given anyone authority to use the same (R 316).

However, if we assume for the purpose of argument that the presence of these horses and mules did constitute a dangerous use of the premises even if properly herded, still there is no proof that the Southern Pacific Company had any knowledge of that practice nor any opportunity to correct it. The only employee of the company who saw these horses and mules was Perine. The evidence in this regard shows that Mr. Perine was an industrial clerk, was not in charge of the West Sacramento corrals, but only counted and inspected shipments and fed and watered them when the carrier was obligated to do so. He worked a shift from 4:00 P.M. to 12:00 midnight. He went off duty at 12:00 midnight on the 16th day of December, 1954, and at or about 10:00 or 10:30 the next morning he was walking over to see his mother and went by the corrals (R 127, 128), and saw the animals outside the corrals but being properly herded by Mr. Coon. He said "Hello" to Mr. Coon and did nothing further. Shortly prior to 3:45 that afternoon he left his mother's home and was walking to work (R 128) (under the same circumstances) but did not speak to Mr. Coon. It is obvious that Perine was not engaged in his employer's business when he saw these horses and mules outside the corral.

Appellant contends when Mr. Perine saw these animals outside the corral, he was obligated to then and there see that they were returned to the corral before they strayed. This duty, if one, has to be premised upon his obligation to act for and on behalf of his employer. As an individual, Mr.

Perine certainly owed no such duty. Likewise, he was only bound to act for or on behalf of his employer when he was engaged in performance of his employer's business and acting in the scope and course of his employment. The times that he saw these animals outside the corral were during his off hours, or when he was off duty. No negligence of his employer can be premised upon Mr. Perine's said conduct for the following reasons:

(a) When an employee is off duty the relation of employer and employee is suspended and does not reattach until the employee resumes the master's work (*Fireman's Fund etc. Co. v. Ind. Acc. Com.*, 39 Cal. 2d 529, 532).

(b) Even if he was on duty, a shipper's use of a corral was not within the scope and course of his employment as an industrial clerk. Mr. Perine's duties in reference to the corral were merely to count and inspect and feed and water livestock in transit if required.

(c) Notice to an off duty employee is not imputed to his employer, 2 Cal. Jur. 2d 861.

The finding of the trial court that the defendant Southern Pacific Company did not participate by act or omission in the negligence of H. L. Coon is thus further substantiated and even though not raised by the pleadings, the issue was properly resolved against appellant.

3. THERE IS NO EVIDENCE OF ANY NEGLIGENCE OF THE APPELLEE IN FAILING TO PROVIDE ADEQUATE FACILITIES AND CORRALS FOR THE HOUSING OF ANIMALS.

Under heading II, the appellant contends that under state and federal statutes a common carrier who transports livestock for hire may not lawfully confine said livestock in cattle cars for more than 36 or 28 hours respectively without unloading for rest, water and feeding in properly equipped pens. The appellant then cites several cases holding that a

carrier is liable to the shipper for loss or injury to cattle which are injured by the failure of the carrier to provide adequate facilities and corrals for feeding and watering cattle in transit. The appellant admits that all of these cases deal with the duty of the carrier to the shipper arising out of the contract of carriage.

From this obligation of the carrier to the shipper to provide adequate pens for livestock in transit, the appellant endeavors to imply that the carrier also became liable to third parties for any negligence of the shipper in his care of his livestock when the latter were under his custody and control. The appellant cites no authority for this assumption and there is no legal basis for any such assumption and particularly so under the circumstances existing in the case at bar.

First, there was no proof that the livestock escaped because of the inadequacy of the corrals. The evidence conclusively showed that the corrals were in good condition and the animals would not have escaped therefrom if the consignee had not taken them therefrom to graze on the area outside the corrals. Therefore, if there was a duty to a third party to provide adequate pens for these animals, there was no breach of that duty proven.

Secondly, it has already been shown that the livestock was not in transit but had been received by the consignee at its destination. It is true that the appellee permitted the consignee to use the corrals but that permission was not a part of the contract of carriage but was in the form of an ordinary license. The appellee's liability (if any) is not different from the liability of any other licensor. Since a licensor is not liable to third parties for the negligence of its licensees (see *Rutherford v. Reilly, supra*) there can be no liability of the appellee for any negligence of Mr. Coon under the facts of this case.

Thirdly, the livestock was under the exclusive care, control and custody of Mr. Coon and the animals escaped through his carelessness in his said control and care of them. Under no circumstances would the appellee be an insurer or guarantor of the safety of third parties from Mr. Coon's conduct in his own care and custody of his own animals.

Lastly, when the shipment arrived at its destination Mr. Coon accepted and unloaded the animals and the contract of carriage then ended, together with any control, custody or care that the appellee may have had during transit. With the termination of this relationship, there was nothing for the carrier to delegate to the shipper as all of its duties as a carrier likewise ceased and terminated. What occurred thereafter relative to reshipment is immaterial for the shipment was not diverted until 24 hours after the accident.

4. ANY DUTY OF A COMMON CARRIER TO EXERCISE REASONABLE CARE TO SEE THAT THE ANIMALS CANNOT ESCAPE WHILE THE SAME ARE IN TRANSIT HAS NO APPLICATION TO THE CASE AT BAR.

Under this heading the appellant relies upon Section 1714 of the Civil Code of California and Section 423 of the Agricultural Code of said state but these sections have no application when the party sought to be charged did not own and/or possess the livestock in question. Section 1714 covers only a liability for injuries occasioned to another by his negligence "in the management of his property". Section 423 covers liability of a "person owning or controlling the possession of any livestock" for injuries occasioned by permitting livestock to stray unaccompanied upon any public highway. Since the appellee was neither the owner nor the possessor of the livestock at the time in question, these sections clearly are not applicable. To circumvent this situation, the appellant contends that the evidence supports a conclusion that the animals were in continuous transit from

Texarkansas, Texas, to Santa Rosa, California, and were stopped merely at Sacramento to feed, water and rest in order to conform to the State 36 hour rule and the Federal 28 hour rule for the watering, feeding and resting of livestock in transit. The appellant then argues that since the animals were removed from the cars at Sacramento to comply with these statutes, the animals were in the care, custody and control of the appellee. It is difficult to follow this argument for the applicable tariff provides to the contrary. Item J of the applicable tariff (R 308) provides:

“The custody and possession of livestock while feeding, watering, resting, sorting and/or consolidation shall be that of the owner and not the carrier.”

Further, Mr. Coon assumed exclusive possession and control over the animals when they arrived at Sacramento, so that in any event the fact remained that his livestock escaped from his exclusive control, custody and possession.

Therefore, whether it is considered that the shipment arrived at its destination on December 16 or whether the shipment merely stopped in Sacramento to comply with the said feeding and watering statutes, the same condition existed, that is, that under the law and the contract of carriage, the exclusive possession, control and custody of the shipment was in the consignee and further as a matter of fact Mr. Coon had such possession, control and custody.

5. THE FINDINGS ARE SUPPORTED BY THE EVIDENCE.

(a) Paragraph III of the Findings of Fact Is Supported by the Evidence.

Under this contention the appellant contends that the purported wire enclosure was the stock corral. During the trial of the action the court and the parties agreed that the word “corral” had reference only to the wooden corral (R 252) and the wooden corral was admitted to be in good

condition. There is no evidence that the appellee constructed or maintained the purported wire fence but the evidence is to the contrary. Mr. Sigmund A. Fisher testified that the make-shift fence was not maintained by the Southern Pacific Company for shippers' use and that he gave no authority to anyone to use it (R 316). As shown heretofore, Don Courtney testified that there was a two-wire fence over about two-thirds of the area but the same did not enclose any area, but to the contrary left an open spot for about one-third of the distance. Mr. Coon and his employee, Tex, strung one wire over this unfenced portion in order to "hold these horses and mules when being watched". We submit that the testimony of Mr. Courtney would not sustain a finding that this makeshift fenced area was constructed and maintained by the appellee.

(b) Findings Nos. IV and V Are Supported by the Evidence.

These findings are taken directly from the uniform livestock contract and, further, were taken from the way-bill as it read on the 9th day of December, 1954, the date of shipment. In fact, the way-bill stayed in that status until the 18th day of December at 4:00 P.M., or approximately 24 hours after the accident. When the diversion order was delivered, then the destination on the way-bill was stricken out and a new destination inserted.

(c) Finding No. VI Is Supported by the Evidence.

Finding No. VI covers the well established facts that when the shipment arrived at West Sacramento, H. L. Coon, as owner of said horses and mules and also as consignee, unloaded them from the cars into said wooden corrals, watered, fed and took exclusive custody and possession of them, and from that time until after 4:30 P.M.

on the 18th day of December (after the delivery of the diversion order and the reloading of the horses and mules) the defendant Southern Pacific Company had no possession or control of them. The appellant criticized this finding for the following reasons, that is:

(1) Contends that the way-bill and uniform livestock contract shows the animals were owned by Haas Owens. In fact these documents do not show ownership, but merely show that Haas Owens was the consignor and that H. L. Coon was the consignee. However, the evidence shows that Coon was the owner (R 150).

(2) The appellant contends that the Southern Pacific Company employees assisted Mr. Coon in unloading the animals and did on two occasions the following day go to the corral to observe the animals and see for their needs. There is no evidence to support this. Mr. Perine testified that he did not assist in the unloading but merely counted and inspected the animals when in the corrals. There is no evidence that he went to the corrals on December 17 for any specific purpose. To the contrary, the evidence was that Mr. Perine merely passed by the corrals on his way to see his mother and returning therefrom while off duty.

(3) The appellant keeps insisting that no receipt for the delivery of said animals was given until the animals arrived at Santa Rosa, California. There is no evidence to support this construction of the evidence for the reason that no receipt was given either at Santa Rosa or Sacramento. The document that Mr. Coon signed at Santa Rosa was not a receipt but it was a certificate, certifying that all the horses, mules, etc., received in Santa Rosa, California, in two designated cars were purchased by "me from Haas Owens" and were slaughtered in Santa Rosa, California, within thirty days after arrival. This certificate was necessary because

horses and mules to be slaughtered are transported at a different and cheaper rate than other horses.

(d) Finding No. VII Is Supported by the Evidence.

Appellant challenges the finding that while said animals were in the exclusive care, custody, control, ownership and/or maintenance of said H. L. Coon, the latter, without any participating act or omission by the defendant Southern Pacific Company, negligently and carelessly permitted said horses and mules to stray. We have already demonstrated that said finding finds ample support in the evidence.

III.

CONCLUSION

We believe that the foregoing shows conclusively that, aside from the well established jurisdictional question, the case before the District Court was one of fact not law. It was resolved against appellant upon substantial evidence. The judgment should be affirmed.

Respectfully submitted,

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No. 15,220

United States Court of Appeals
For the Ninth Circuit

GLEN EARL GRIGG,

Appellant,

VS.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellee.

Appeal from Judgment of the United States District Court
for the Northern District of California,
Northern Division.

Honorable Sherrill Halbert, Judge.

APPELLANT'S REPLY BRIEF.

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No. 15,220

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Appellee.

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Northern Division.**

Honorable Sherrill Halbert, Judge.

APPELLANT'S REPLY BRIEF.

**I. THIS ACTION WAS NOT PROPERLY REMOVED FROM THE
STATE COURT TO THE UNITED STATES DISTRICT COURT.**

The appellee bases the propriety of the removal of this action from the State Court to the United States District Court on the case of *Stamm v. American Telephone & Telegraph Co.*, 129 Fed. Supp. 719, and upon the case of *Southern Pacific Company v. Haight*, 126 Fed.2d 900.

In *Stamm v. American Telephone & Telegraph Co.*, *supra*, the Court held that the removal of the action was improper and that plaintiff's motion to remand was good and the motion was granted and the cause

was remanded to the State Court. In that suit, plaintiff commenced an action in the State Court in Missouri. The plaintiff sued the American Telephone & Telegraph Company, a New York corporation, Western Electric Company, a New York corporation, and Richard H. Tatum, a citizen of Missouri, and later by amended complaint sued additionally Audivox, Inc., a Delaware corporation. The suit was commenced on January 27, 1953, and on March 3, 1955, the defendants, American Telephone & Telegraph Company and Western Electric Company, filed a petition for removal. The basis for their petition was that plaintiff was a resident of Kansas; A.T.&T. and Western Electric were corporations of New York and that Tatum, who was a citizen and resident of Missouri at the time of the commencement of the action, was in 1955 a citizen of the State of Pennsylvania and had not been served with process, and that therefore plaintiff had abandoned his action against Tatum; thus there was diversity of citizenship as to all persons. The defendant, Audivox, Inc., was not served with process. Upon the filing of petition to remove cause to Federal Court, the plaintiff filed a motion in the Federal Court to remand cause to State Court. The United States District Judge in granting the motion to remand to the State Court, stated at page 720 of the decision:

“From the foregoing, it is evident that a joint cause of action was stated by the plaintiff (a citizen of Kansas), in the state court, against A.T.&T., Western (citizens of New York), Audivox (a citizen of Delaware), and Tatum, who

was then, and for more than six months thereafter, a citizen and resident of Missouri, but who, at the time of the filing of the petition for removal, on March 3, 1955, was a citizen and resident of Pennsylvania. Out of these facts the first question arises, as to whether diversity is shown.

“Petitioner-defendant, A.T.&T. and Western, contend that it is, saying that ‘The removable character of a cause is determined as of the date the petition for removal is filed’ and they cite *Brown v. Eastern States Corp.*, 4 Cir., 181 F.2d 26, 28. That case clearly announces the law that a ‘cause is not to be remanded if it was properly removable upon the record as it stood at the time the petition for removal was filed.’ But how stood the record here at the time the petition for removal was filed? Does it not show that at the time of the institution of the suit the defendant, Tatum, was a citizen and resident of Missouri? *For nearly three-quarters of a century the law has been well settled that an action may not be removed from a state to a Federal court, on the ground of diversity of citizenship at the time of filing the petition for removal unless such diversity also existed at the time of the commencement of the suit.* Citing *Gibson v. Bruce*, 108 U.S. 561, 2 S. Ct. 873, 27 L. Ed. 825; *Houston & Texas Central R. Co. v. Shirley*, 111 U.S. 358, 4 S. Ct. 472, 28 L. Ed. 455; *Akers v. Akers*, 117 U.S. 197, 6 S. Ct. 669, 29 L. Ed. 888; *Kellam v. Keith*, 144 U.S. 568, 12 S. Ct. 922, 36 L. Ed. 544; *Jackson v. Allen*, 132 U.S. 27, 10 S. Ct. 9, 33 L. Ed. 249; *Young v. Parker*, 132 U.S. 267, 10 S. Ct. 75, 33 L. Ed. 352; *Stevens v.*

Nichols, 130 U.S. 230, 9 S. Ct. 518, 32 L. Ed. 914; Kraut v. Worthington Pump & Machinery Corp., D.C.N.Y., 1 F. Supp. 307. Thus, though defendant, Tatum, was not, on March 3, 1955, when the removal petition was filed, a citizen of Missouri, and had not been since August 8, 1953, the admitted fact is that he was a citizen of Missouri at the time of the institution of this suit, and, therefore, under the cases cited, diversity of citizenship does not exist, unless the plaintiff by some affirmative act of his has, meanwhile, abandoned or discontinued the action as to the defendant, Tatum, and that matter presents the next, and only remaining, question for consideration.

“It is quite well settled that if the plaintiff *voluntarily* dismisses, discontinues, or in any way abandons, the action as to the resident joint defendant, the cause then becomes removable, and may, upon prompt action, be removed by the nonresident defendants who have been served. (Citing cases.)”

The Court further held in that case that the mere failure to serve process on Tatum did not constitute a voluntary dismissal or abandonment of the action against him, and therefore the cause was not then removable.

The case establishes two fundamental points of law. First, it provides that a cause of action is not properly removable unless it is demonstrated that not only is there diversity of citizenship at the time of filing the petition for removal, *but also that it must appear that the diversity of citizenship existed at the time of*

the commencement of the suit. Secondly, the case stands for the proposition that there must be a *voluntary* abandonment as to the resident joint defendant or defendants before there can be a removal.

The complaint on file in the case at bar demonstrates that there was not diversity of citizenship existing at the time of the commencement of the suit. The complaint demonstrates a common domiciliary existing between the plaintiff and defendant, Harver Coon Gendel, at the time of the filing of the suit. Thus, a diversity of citizenship did not exist at the time of commencement of the action, and therefore the cases cited by the Court in *Stamm v. American Telephone & Telegraph Co.* indicate that the Federal Court was without jurisdiction in the case.

Further, there was no *voluntary* dismissal as to the defendant, Harver Coon Gendel. The record before the trial Court in the state Court demonstrates that the plaintiff was unable to effect service of process upon the defendant Gendel, and as a result the Court forced the dismissal. However, at that stage of the proceeding, there still existed in the case the six fictitious designated defendants. The plaintiff moved the Court to set aside the dismissal as to Gendel in order that plaintiff's counsel could serve process upon him and the fictitiously designated defendants. The record in this case abundantly shows that counsel for defendant, Southern Pacific Company, knew at least sixty days in advance of the trial date scheduled in the State Court that plaintiff had been unable to serve Gendel with process, and that plaintiff's counsel

had notified defendant's counsel that they would be required to dismiss the suit as to him because of their inability to effect service of process. The case of *Southern Pacific Company v. Haight*, 126 Fed.2d 900, distinguishes between a *voluntary* dismissal and a dismissal which is *in invitum*. In that case, at page 904, the United States Court of Appeals, Ninth Circuit, quoting from the case of *Berry v. St. Louis & S.F.R. Co.*, cited at 118 Fed. 911, stated in part as follows:

“I am aware that the Supreme Court has held in many cases that for all the purposes of a suit, the cause of action is ‘whatever the plaintiff declares it to be in his pleadings’; but the words so employed should be read in the light of the facts which were then presented for consideration. In those cases no subsequent condition arose outside of the pleadings which might fairly be said to operate as a voluntary abandonment by the plaintiff of the character of his action as first formally declared. There are also cases in which it is held that, where the defendant whose presence prevents a removal from a state court to a circuit court of the United States suffers a default, such condition does not give rise to a right of removal in the remaining defendant. And there are also cases in which the right to remove is denied when at the trial the court renders a judgment of dismissal against the defendant whose presence is incompatible with federal jurisdiction. But in neither of these classes of cases is the result due to the voluntary action of the plaintiff whose election controls the course and nature of the suit. The action of a court in dis-

missing a defendant at the trial is in invitum, and is not the voluntary act of the complaining party. Nor is he responsible for a default suffered by a defendant whom he has sued jointly with others upon a joint cause of action.”

In the *Southern Pacific v. Haight* case, the plaintiff had announced himself ready to proceed against Southern Pacific solely. In the Grigg case at bar, the plaintiff had merely notified the Court that he was unable to effect service of process upon the defendant Harver Coon Gendel, because the latter had apparently moved to Arkansas, and thereupon the Court entered a dismissal without prejudice as to that defendant. The Court and parties had not severed the action, nor elected to proceed against Southern Pacific solely, at the time the petition for removal was filed. Whether the plaintiff intended to serve employees of the Southern Pacific Company as such fictitious defendants or whether the plaintiff intended to dismiss as against said fictitious defendants had not yet been determined by the Court at the time the defendant Southern Pacific Company filed its petition for removal. Prior to the filing of the petition for removal, which was carried by hand from the courtroom of the State Court to the courthouse of the United States District Court, the plaintiff's counsel moved to have the dismissal against Gendel set aside. The Superior Court had jurisdiction at that stage of the proceeding to hear and determine the validity of its jurisdiction and to continue the trial of the action for a period of time commensurate with the

time required by plaintiff to serve process on the employees of the Southern Pacific Company residing in California.

The motion or petition to remove cause was made by Southern Pacific at least sixty days after knowledge having been imparted to them by plaintiff's counsel of their inability to serve defendant Gendel. It was made at the day of the scheduled trial of the cause in the State Court and for the obvious purpose of delay. The petition for removal was filed before the Superior Court had disposed of the question of the fictitiously designated defendants and of the motion of the plaintiff to set aside the dismissal and to continue the trial date.

This Court must view the *Southern Pacific Company v. Haight* case in the light of the circumstances which prevailed in that case. In that case, the plaintiff appeared in the State Court ready to proceed to trial, and because he had been unable to effect service of process on a co-defendant, it was dismissed as to that defendant. The Southern Pacific attorneys immediately petitioned to remove the cause to the Federal Court. A motion to remand the cause to the State Court was made by the plaintiff but denied by the District Court. The case then proceeded to trial in the District Court, and a judgment was made and entered in favor of plaintiff and against the defendant railway company for \$18,500.00. After having instituted the removal to the United States District Court, the Southern Pacific Company then took the position in the United States Court of Appeals that their

petition of removal was improper and that the District Court had no power to try the case and the cause should have been remanded to the State Court.

The United States Court of Appeals therefore had before it a case wherein the defendant had caused it to be removed from the State Court to the Federal Court, and which case had then been tried in the Federal Court and in which the plaintiff had prevailed. It was then confronted with the position by the defendant that it should not have been removed in the first instance. The Appellate Court found there had been a severance of the cause and that there was the requisite diversity of citizenship and that therefore jurisdiction existed and the judgment for the plaintiff was affirmed.

The *Southern Pacific* case as to its facts is not in point with the Grigg case, since there were still matters before the State Court for determination, and because of the fact that no diversity of citizenship existed at the time of commencement of the action.

It is respectfully submitted that the United States District Court had no jurisdiction to try this case, and that this case should have been remanded to the State Court on the plaintiff-appellant's petition to remand.

II. APPELLEE-DEFENDANT'S STATEMENT OF FACTS IS ERRONEOUS.

The statement of facts at page 11-14 of appellee-defendant's brief is erroneous. The destination for

the two carloads of horses and mules is clearly stated on the way bills (Plaintiff's Exhibits 17 and 18) as being Santa Rosa, California. The testimony of Sigmund Fisher, employee of the Southern Pacific Company, demonstrates that no one accompanied the animals on the trip and no one signed a release to the railroad company of liability in accompanying the animals. (Tr. Rec. pp. 320, 321.) He further testified that no receipt had been signed by Mr. Coon for the animals when they arrived in Sacramento. (Tr. Rec. p. 321.) He further testified that when the animals were ultimately delivered in Santa Rosa, the company secured a receipt for delivery of them. (Tr. Rec. p. 322.) Further, Mr. Fisher testified that the company was paid for the shipment of the animals from Bakersfield, California, through to Santa Rosa, California. (Tr. Rec. pp. 291, 293.) Mr. Fisher further testified that the records indicate that when the horses and mules were transported from Sacramento to Santa Rosa, they were carried upon the said railroad cars in which they had arrived in Sacramento on December 16. (Tr. Rec. pp. 294-295.) He also testified that plaintiff's exhibits in evidence, numbers 17 and 18 (the way bills), were the only documents involved in the shipment.

While the Southern Pacific Company technically became the connecting carrier at Bakersfield, California, the feeding and rest records on the way bills of lading demonstrate that the last rest stop was made in Barstow, California, on December 14th at 3:20 A.M., and that on December 15th at 2:10 A.M.

the animals were reloaded and shipped from Barstow California. The records clearly indicate that after leaving Barstow on December 15 at 2:10 A.M., they proceeded to Sacramento some 412 miles distant, arriving in Sacramento on December 16 at 10:30 A.M., and that 32½ hours had elapsed from the time the horses left Barstow until they arrived in Sacramento. That under the twenty-eight-hour rule of the United States Code, the animals had to be removed in Sacramento for rest and feeding, as is required by law.

The record further indicates that upon their unloading in Sacramento, Mr. Anthony Perine, a Southern Pacific employee, notified his superior officers that the animals were in the Southern Pacific corral, and he made an entry in the official stock book of the Southern Pacific Company concerning the same. (Tr. Rec. pp. 118-119; Plaintiff's Exhibit 11 in evidence.)

As to the condition of the Southern Pacific corrals, the evidence is perfectly clear by the testimony of Sigmund Fisher that on the outside of the wooden corrals, but on Southern Pacific land, there existed a two-strand wire fence which Mr. Fisher testified to being a "makeshift wire fence" which had existed there for some time, but that he did not know how it got there. (Tr. Rec. p. 316.) Officer George Houcke also testified concerning the makeshift wire fence on the Southern Pacific property. He stated that there were not too many wires, and some of them sagged. Mr. Don Courtney testified that there was a makeshift wire fence on the Southern Pacific property out-

side of the corral extending from the corral out and along E Street and back to the corral. It was a two-wire fence in some places and a one-wire fence in other places *and that the fence had been put up by some horse traders some five years ago and had existed on the Southern Pacific property for some five years.* That Mr. Coon had patched it up in places. (Tr. Rec. pp. 256-260.)

There was a stipulation contained at page 266 of the record that there was no written authority in the files of the Southern Pacific Company authorizing Mr. Coon to feed the horses and mules.

The appellee's contention that the wire fence had been put up by Mr. Coon just prior to the accident is not supported by the record. The record demonstrates that the fence had existed on Southern Pacific property for five years, and Mr. Fisher testified to his knowledge of the existence of the fence.

The record conclusively demonstrates that employees of the Southern Pacific Company, and particularly Mr. Anthony Perine, knew that the fifty horses and mules had been taken out of the corral and placed on the Southern Pacific property within the makeshift wire enclosure. That this knowledge was expressly known to Southern Pacific employees at 10:00 A.M. and 4:00 P.M. on the day of the accident. The record conclusively demonstrates that the Southern Pacific employees did nothing to cause these horses and mules to be returned to the wooden corral. At the time said mules were being fed and grazed outside of the

wooden corrals and within the confines of the makeshift fence, the Southern Pacific Company employees knew that they were being held adjacent to public streets and roads, and that the makeshift fence was so constructed as to render it quite easy for the horses and mules to escape from the corral and along the public roads. That within an hour and a half of this knowledge, the mules were out on public roads. At that time Mr. Perine and Mr. Duke had been instructed by their superiors to go out and search for the mules and presumptively seek to return them to the corral.

That further, Mr. Duke and Mr. Perine did go out and search for the mules and did return same to the corral. They also sent the two dead mules to a reduction plant, advising the plant that the mules belonged to Southern Pacific Company.

As a factual matter the evidence demonstrates that the mules were in the care, custody and control of Southern Pacific. Further, as a matter of law, they were so controlled and possessed by Southern Pacific Company.

III. APPELLANT-PLAINTIFF'S REPLY TO DEFENDANT-APPELLEE'S ARGUMENT.

The defendant-appellee takes the position that even though the livestock may have been stopped in Sacramento for feeding and watering, "under tariff regulations the custody and possession of livestock while feeding, watering and resting shall be in the owner

and not the carrier.” This regulation might be binding or effective as between the owner of the livestock and the common carrier, but it cannot preclude a third party stranger who was injured by those livestock from recovery against the carrier or the owner. In the first instance, the United States Code, 45 U.S.C., Secs. 71 and 72, requires a common carrier of livestock to maintain properly equipped pens in discharge of their duty of carriage. Obviously, the law was promulgated to preserve the property of the owner of the livestock, and was equally intended as a protection to the general public so as to require adequate restraint to prevent escaping livestock from damaging persons or property.

Further, while the tariff regulation might be construed as having some effect in an action between the owner of the livestock and the railway, the cases on the subject matter hold otherwise. In *Mering v. Southern Pacific Company*, 161 Cal. 297, it was provided that while an owner may agree to accompany livestock or care for them, this does not relieve the railroad from providing adequate feed, water and properly equipped pens for their resting and feeding. In 13 C.J.S., Carriers, Sec. 43, and the cases therein cited, it is provided that the pens or corrals provided by common carriers for hire for the maintaining of livestock *must be constructed and maintained in such a state of efficiency as is reasonably calculated to prevent animals from escaping therefrom, and the failure to fulfill this duty in this regard will render the carrier liable for loss or injuries sustained thereby.*

Further, at pages 35 and 36 of the Appellant's Opening Brief, there are cited a number of cases which provide that a railroad may not delegate its public duties. Implicit in these cases, and the substantive law, would be the proposition that the common carrier may *not* delegate its liability to the general public by simply providing that custody shall be in the owner while the livestock is in the company's pens. The case of *Los Angeles & S.L.R. Co. v. Umbaugh*, 61 Nev. 214, 123 Pac.2d 224, specifically held that the rule of nondelegation applies even when the Interstate Commerce Commission approves the delegation.

Thus, the tariff regulation 188-G relied upon so heavily by defendant, can have no application to third party strangers injured as a result of the escape of animals impounded by the common carrier, in the carrier's corrals.

The law is clear that the duty which a possessor of land owes to others to keep and maintain his premises in reasonably safe condition or to use his premises and property so as not to injure others is a nondelegable duty. See *Vazzoli v. Nance's Sanitarium*, 109 Cal. App.2d 232, 240 Pac.2d 672. It is generally the law under Civil Code Section 1714 that everyone is responsible for an injury occasioned to another by want of ordinary care in the management of use of his or their property. See *Jaehne v. Pacific Telephone & Telegraph Co.*, 105 Cal.App.2d 683, 234 Pac.2d 165.

In *Hubbard v. Matson Navigation Co.*, 34 Cal.App. 2d 475, 93 Pac.2d 846 (certiorari denied, 60 S. Ct.

975, 310 U.S. 628, 84 L. Ed. 1399) it was held that a contract between a carrier and a shipper, completely exonerating the carrier from liability for the negligent injury to goods carried by it, is void as being against public policy.

Following that doctrine to its logical conclusion, a statute or attempted tariff regulation seeking to relieve a property owner or carrier from liability to the general public for the use of its property would be void as against public policy. Civil Code Section 1714 provides as follows:

“Everyone is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill *in the management of his property* or person, * * *”

In *Porter v. Thompson*, 74 Cal.App.2d 474, the Court found both the cattle auctioneer and the owner of the property upon which the cattle were being auctioned as jointly liable for injuries sustained to a third person when the cattle jumped over the fence injuring that person.

In *Pschomy v. Brooks Market*, 60 Cal.App.2d 158, and a subsequent decision in 79 Cal.App.2d 556, the owner of property was held liable for use of the property by a prospective future tenant which use caused injury to a third person.

Under substantive law, an owner of land is liable for a negligent use of that land by himself or by a person whom he permits to use the land. Therefore,

a tariff regulation which provides that (as between a carrier and an owner of property being carried) custody is in the owner, cannot alter the duty of law imposed upon owners of property and their use of that property. While privity of contract may exist between the carrier and the owner of the livestock, so that such a regulation would be binding between the two, a duty of law exists on the part of the common carrier and owner of the property to see that their carriage is not negligent and to see that their property is used in a fashion which will not cause injury to third persons. The carrier may not allow his property to be used with his knowledge in such a manner that it will injure parties, and seek to disclaim liability under some contractual arrangement.

A typical illustration can be found in the operation of motor vehicles. The law places upon the owner of an automobile a statutory liability. If an automobile owner allows a person to use his car, and that person negligently operates or uses the car so as to injure third persons, both the owner and the operator are liable. The owner of the automobile may not delegate or disclaim his duty by contracting with the operator. The duty of the owner has been created by statute or by substantive rule of law, and that duty may not be transferred or disclaimed to the prejudice of third parties injured as a result of the use of the automobile.

In *Nichols v. Hitchcock Motor Co.*, 22 Cal.App.2d 151, 70 Pac.2d 654, it was expressly held that a party may not contract to exempt himself from liability

for the consequence of his negligence, if that party is charged with the duty of public service, and the contract relates to negligence in performance of any part of such duty to the public.

Thus, the Southern Pacific Company could not contract with the owner of livestock to exempt itself from negligence in the transportation of said livestock in such a way that their contract would be binding on the general public. Similarly, a tariff regulation seeking to declare that livestock in a common carrier's corral or pen is in the sole possession and control of the owner would be illegal if that tariff regulation was sought to be interpreted as meaning that the common carrier had no further duty to the public at large. While the regulation may be binding as pertains to injuries sustained by the animals (as between the owner of the animals and the carrier), it is not binding in so far as it relates to the livestock escaping and injuring members of the public. Neither a contract, regulation, or company rule could place the custody or care of livestock beyond the control of the carrier so as to exempt it from liability to the public at large. A carrier engaged in the transportation of livestock is required by law to maintain adequate pens and facilities for their care and control. If those pens and corrals are inadequate or if they are improperly used to the knowledge of the railroad (which was the case here) that carrier is liable to any member of the public injured as a result of said negligence.

The case of *Rutherford v. Reilly*, 104 Cal.App.2d 629, cited at page 15 of the defendant-appellee's brief, has been fully treated by the plaintiff-appellant at pages 42-45 of his opening brief. The case is not in point. That case involves a relationship of stable keeper—owner. The case at bar involves a common carrier for hire who is required by law to maintain adequate pens and corrals for the maintenance and control of livestock being shipped by that carrier. The *Rutherford* case did not involve the question of a nondelegable duty of a railroad but involved only the duty of a stable keeper bailee who had no notice of the negligence of the owner. In the case at bar, the railroad had actual knowledge of the negligent conduct in the feeding and grazing of the horses outside the wooden corral but within the so-called "makeshift wire fence" on the carrier's property. This condition existed continuously from 10:00 A.M. until the happening of the accident, was actually observed by S. P. Co.'s employees, but nothing was done to return the horses to wooden corrals.

At pages 20-22 of the defendant-appellee's brief, it is contended that there was "no evidence of any negligence in failing to provide adequate corrals." It is further contended that "there was no proof that the livestock escaped because of the inadequacy of the corrals."

Plaintiff's Exhibit 11 in evidence, being the stock record book of defendant company, demonstrates that Anthony Perine made an entry in that book as follows:

“December 18, 1954, 5 P.M.: Consignee H. L. Coon. *Horses escaped from corral*, ran on Yolo freeway, and two killed by autos. Turned over to reduction. One had bad lacerations on the right shoulder when corraled.

(signed) ‘R.D.’ ”

Mr. Fisher testified that he in the past had observed a *makeshift* wire fence in the vicinity of the corral. Mr. Perine testified as observing the horses being fed two hours before the accident outside of the corral inside of the makeshift wire fence and only being watched by one man. Mr. Don Courtney testified that the makeshift wire fence *had existed for five years on the property of Southern Pacific* and that it was a poor fence and that the horses and mules could cross it if they wished to. (Tr. pp. 242-243.) Officer Houcke testified of examining the corral the morning following the accident and that the corral he saw was enclosed by wire and there were not too many wires and some of the wires sagged somewhat, and that there were numerous avenues from the corral to the highway upon which the mules could escape and reach the highway. (Tr. p. 195; pp. 200-207.) This evidence obviously meets the contention as to the adequacy of the corrals.

The Southern Pacific Company bases its entire case on the proposition that once the animals were placed in the Southern Pacific corral that the consignee, Mr. H. L. Coon, was immediately charged with the full and complete, care, custody and control of the animals, and that the Southern Pacific Company

had absolutely no liability of any kind or character thereafter. This position is asserted "to be the law" whether the animals were still in transit or whether they had reached their terminal point.

This argument completely ignores the general statement of law in Section 1714 of the Civil Code which charges responsibility to any person for the negligent management or use of his property. It ignores 45 U.S.C., Sections 71 and 72, and Section 422 of the Agricultural Code of California, both of which statutes require a carrier of livestock to provide properly equipped pens in its operations. Further, the contention ignores the substantive law found in Restatement of Torts, Section 318, and ignores the proposition of law set down in *Porter v. Thompson, supra*, and the substantive law acknowledged in *Pschomy v. Brooks Market, supra*. It further ignores the proposition of law stated in the cases at pages 35 and 36 of appellant's opening brief that the railroad may not delegate its public duties.

The law has long since established the general proposition that a common carrier is responsible for its negligence in the operation and conduct of its affairs. That the common carrier may not delegate these duties. Further, a landowner is liable for the negligent use of its land, whether by its own use or by the use of persons authorized to come on the land. The contention of the appellee-defendant therefore must be disregarded as not supported in law.

SUMMARY.

This case presents an extremely serious and important phase of law to the Court. It appears to involve a matter of first impression in so far as the fact situation exists. If the decision of the trial Court is allowed to stand, the general public shall be required to assume the peril as regards the care, transportation and confinement of livestock by railroads and other carriers. By the simply expedient of relying upon the tariff regulation, which actually involves a duty existing only between the carrier and the owner of the livestock, the public has been and will be without any protection or right when injured by escaping livestock. The carrier, in requiring an owner to feed his livestock in the carrier's pens, can by that simple expedient escape all liability, remove all duty of care on its part to the general public and still collect the profits accruing from the transport of livestock.

Today, the great development of urban areas and the increased shipment of livestock into those areas to feed and meet the necessities of the area, involves a substantial growing business. The carrier is engaged in the business for a profit. It can bring into urban areas, under the existing decision of the trial Court, large numbers of livestock with complete impunity and without any liability or duty of care and can still reap all of the profits from the transaction.

The ruling of the trial Court is harsh as to this plaintiff as well as the general public at large and

creates a false duty and responsibility. It authorizes a common carrier to engage in transportation and care of livestock for profit without any duty of care or responsibility on its part to the public.

It is respectfully submitted that such is not the duty intended by the legislature nor as is defined in the cases cited in the briefs of the appellant herein. The judgment of the trial Court should be vacated and set aside.

Dated, San Francisco, California,

March 6, 1957.

Respectfully submitted,

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CHARLES J. MILLER,

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Attorneys for Appellant.



No. 15,220

United States Court of Appeals
For the Ninth Circuit

GLEN EARL GRIGG,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellee.

Appeal from Judgment of the United States District Court
for the Northern District of California,
Northern Division.

Honorable Sherrill Halbert, Judge.

APPELLANT'S PETITION FOR A REHEARING.

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Honorable Sherrill Halbert, Judge.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Dal M. Lemmon, James Alger Fee,
and Richard H. Chambers, Circuit Judges:*

The Petitioner, Glen Earl Grigg, petitions for a rehearing in the United States Court of Appeals, after decision by said Court affirming judgment of the United States District Court, and in this connection respectfully shows:

GROUND'S FOR REHEARING.

1. The decision of this Court failed to determine the question as to whether the duty of the defendant

railroad was a non-delegable duty. In fact the duty was a joint duty upon the part of the railroad and the consignee.

2. The decision of this Court provided that petitioner herein raised the issue of negligent use of the railroad's land for the first time on this appeal. In fact petitioner herein asserted the issue of negligent use of the railroad's land and premises in the trial Court.

3. The Court in this decision determined that custody and control of livestock in a railroad's corral at a termination point is the responsibility of the carrier until either the consignee appears and takes charge of the livestock or until a new contract of shipment is made. In fact the custody of livestock within a railroad's corral remains the responsibility of the carrier until the livestock has been removed from the carrier's premises.

4. The Court determined in this decision that jurisdiction existed in the U. S. District Court. In fact, the Petition of Removal filed by defendant railroad herein was premature and that the State Court continued to have jurisdiction over the action while plaintiff's Motion for Relief from the dismissal of defendant Coon was pending and while plaintiff's Motion for Continuance was pending.

5. The decision of this Court does not take into account the implied duties created by California Agriculture Code, Section 422 and Volume 45, U. S. Code Sections 71 and 72 which require carriers to maintain

adequate corrals and pens not only for the protection of the livestock, but for the protection of the public at large.

AUGMENTED FACTS.

There is exhibited to this Petition for Rehearing the plaintiff's Notice of Motion to Amend Complaint to conform to Evidence, his Motion to Amend Complaint to Conform to Evidence, and his Second Amended Complaint, all of which were filed in the District Court on April 6, 1956, and which Motion was subsequently denied by the Court on July 16, 1956. (Transcript page 52.)

The plaintiff in designating the record to be prepared on appeal designated for inclusion in that record his proposed Second Amended Complaint. Through inadvertence, the said Second Amended Complaint which had been filed in conjunction with the Motion to Amend Complaint was not included in the record on appeal, and that the said failure to include same was overlooked by counsel for the plaintiff.

Following the entry of the Opinion in this case on June 28, 1957, the plaintiff requested that the said Notice of Motion to Amend Complaint to Conform to Proof and that Motion accompanying same, together with the proposed Second Amended Complaint be forwarded to the Clerk of this Court as a supplemental record for inclusion in the record of the proceedings in this matter.

Additionally, and out of an abundance of precaution, the petitioner herein attaches said documents to this petition as exhibits thereto.

LEGAL ARGUMENT.

1. THE DUTY OF CARE BY THE RAILROAD WAS NON-DELEGABLE AND A JOINT DUTY OF CARE THUS EXISTED.

In the opinion of this Court affirming the decision of the United States District Court, the Court concluded that the trial court properly found that the horses and mules on December 17 were in the sole possession, custody and control of Mr. Coon. (Page 8, Opinion). That the carrier surrendered control of the horses and mules on December 16 and it was not until a diversion order was issued on December 18 that the carrier resumed the control. The substance of the Court's opinion provides that the issue of "control of livestock" is a matter of agreement of the parties or the physical presence of the owner or consignee. Such a construction completely ignores the actual fact that the horses and mules were in the Southern Pacific corral, on Southern Pacific's land under the observation of the Southern Pacific's corral master and being restrained within facilities which both State and Federal law require to be maintained by a carrier as an inherent facility in the transportation of livestock for hire.

Further, the said animals were in the Southern Pacific Company corral, following carriage from Barstow, California, which carriage commenced on

Wednesday, December 15, at 2:10 A. M. and which carriage ceased at Sacramento, California, on Thursday, December 16, at 10:30 A. M. some 412 miles distant from Barstow. Further, the animals were unloaded at Sacramento after an elapse of $32\frac{1}{2}$ hours time in transit from Barstow to Sacramento, which time elapse exceeded the time stated in the Federal statutes and was just $3\frac{1}{2}$ hours from exceeding the State law. This evidence demonstrates that the animals were discharged at Sacramento for rest and feeding and remained in the control and custody of the railroad.

Further, assuming that Sacramento was the terminal point of shipment of these animals, nevertheless they were held on Southern Pacific's land in a Southern Pacific corral under the observation of Southern Pacific employees and the duty and responsibility of a carrier does not cease upon termination of transit but would continue within the legal category of a bailee relationship until the property or animals *were removed from the premises of the railroad company.*

A duty of a railroad is a non-delegable duty unless expressly made delegable by a statute. At pages 35 to 37 of the appellant's Opening Brief, this law was discussed. That law therein recited is incorporated herein by reference and not repeated for brevity's sake.

Section 2120 of the Civil Code of California provides as follows:

“2120. (Notice when freight not delivered.)

If, for any reason, a carrier does not deliver

freight to the consignee or his agent personally, he must give notice to the consignee of its arrival, and keep the same in safety, upon his responsibility as a warehouseman, *until the consignee has had a reasonable time to remove it.* If the place of residence or business of the consignee be unknown to the carrier, he may give the notice by letter dropped in the nearest postoffice.” (Emphasis added.)

Section 2121 of the Civil Code of California provides:

“2121. (When consignee does not accept.) If a consignee does not accept *and remove freight within a reasonable time* after the carrier has fulfilled his obligation to deliver, or duly offered to fulfill the same, the carrier may exonerate himself from further liability by placing the freight in a suitable warehouse, on storage, on account of the consignee, and giving notice thereof to him.” (Emphasis added.)

Both Sections contemplate a responsibility on the part of the carrier which continues *until such time as the shipper's property has been removed from the premises of the railroad.* The same theory of law would be applicable to livestock. Until they are actually removed, *there is a joint and dual duty and responsibility to restrain the livestock to prohibit them from escaping.*

It is to be noted in the facts of this case that it was admitted by the Southern Pacific agent that (1) no receipt was given for the animals until they arrived at Santa Rosa, California; and (2) that no written

permission was given by the consignee to care for or feed the animals in Sacramento; and (3) that no payment was made to the railroad for the transportation of the animals until they had been delivered in Santa Rosa.

This Court's opinion is based primarily upon the following sentence quoted from page 9 of the Opinion as follows:

“As against the public, outside the expressed contract, the animals could have been in the carrier's custody *if the consignee had not actually taken charge of them or if he had returned the care of the animals to the carrier.*”

The petitioner vigorously disagree with the holding that custody and control of the livestock must be viewed in the limited light that either a new contract of carriage has been signed or that the consignee might be on the premises feeding the animals. Custody and control must be viewed in the light of the legislative enactment requiring the maintenance of adequate pens and corrals and must further be viewed in the light that so long as the livestock are retained upon the carrier's land or premises that said carrier owes a duty to the public to exercise reasonable care to prevent the animals from escaping and injuring people.

The duty exists on the part of the railroad and the consignee until such time as the livestock are *removed from the property of Southern Pacific Company by the consignee.* The mules and horses in this case were never removed from Southern Pacific's property, but

were always upon the Southern Pacific's premises and property until they escaped.

It is respectfully submitted that the Railroad's duty in this instance was a non-delegable duty and that that duty continued so long as the livestock were held on Southern Pacific property, regardless of any technical attempt to change possession or custody by virtue of any document or contract to which the public at large was not in privity. That since the trial court has found as a fact that the livestock escaped from the corral through the negligence and carelessness of Coon, which negligent conduct was observed by Southern Pacific employees within two (2) hours of the accident, then that negligence is chargeable to the Railroad since they owed a joint or dual duty to the public at large.

2. THE PETITIONER HEREIN RAISED THE ISSUE OF NEGLIGENT USE OF THE RAILROAD'S LAND IN THE TRIAL COURT.

The petitioner did not await until the time of the appeal to urge and raise the question of negligent use of the railroad's land but that said issue was continuously before the trial Court either expressly by the plaintiff's pleading or impliedly in the manner by which the trial was conducted by plaintiff.

Rule 15 (b) Federal Rules of Civil Procedure, provides in part as follows:

“Amendments to conform to the evidence. When issues not raised by the pleadings are tried by the express or implied consent of the parties,

they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect result of the trial of these issues * * *."

Evidence that the issue of negligent maintenance of the Southern Pacific property was an issue raised either expressly or by implication and tried is as follows:

(1) Plaintiff's complaint charges the defendants and each of them with *negligence and recklessness in their care, custody, control, ownership and maintenance of said horses and mules so as to allow them to stray on the highway*. That language, particularly that of "Maintenance" carries with it the obvious implication of holding, restraining, maintaining, holding animals within a corral, or confining the animals. Both of the defendants were charged with not only the negligent control and custody of the animals, but also with the negligent maintenance of them;

(2) That this question of law was argued before the trial court upon the close of plaintiff's case and legal authority was cited to support the proposition commencing at page 346 of the transcript and running through to page 377 of the transcript.

(3) In the testimony of the following-named witnesses at the following designated portions of the transcript, the issue of the negligent mainte-

nance of the strand wire fence outside of the major wooden corrals was raised in the case, tendering the issue of the fact that the railroad had furnished an unsafe place to keep the livestock;

- (a) Testimony of Anthony Perine, pages 156 to 157;
- (b) Testimony of Officer George Houck, transcript pages 183 to 185;
- (c) Testimony of Don Courtney, transcript pages 242 to 243, and page 256 to page 259; pages 261 to 262.
- (d) Testimony of Sigmund Fisher, pages 316-317.

The above testimony of Mr. Perine, Mr. Houck, Mr. Courtney, and Mr. Fisher, as designated, all relate to evidence showing inadequacy of a wire fence surrounding the outside corral located on Southern Pacific's property. The testimony demonstrated that said inadequate wire fence was maintained with the full knowledge of the Southern Pacific Company and as Mr. Courtney testified, mules and horses could escape from it easily. This testimony was connected up with testimony in conjunction therewith showing that there were immediately accessible rights of ways and public roads from the point of that inadequate wire fence directly to the freeway upon which the animals were struck. That testimony was also connected up with the testimony of Mr. Perine demonstrating that the Southern Pacific employees knew that the said horses and mules were being held in

said inadequate wire fence immediately prior to the happening of the accident.

Such evidence obviously comes within the provisions of Rule 15, Subparagraph (b) Federal Rules of Civil Procedure, as an express or implied issue which was tried.

It is submitted that such testimony and evidence demonstrates that one of issues tried in this case was *that the railroad had furnished to Mr. Coon an unsafe place to keep the livestock and that the railroad had knowledge that said livestock was being kept in such unsafe place.* The Court rendered a finding based upon evidence that the animals had escaped from the corral, and that Mr. Coon negligently and carelessly permitted and allowed the horses to escape and stray upon the highway.

The objectives of Rule 15 Federal Rules of Civil Procedure (hereinafter termed F. R. C. P.) is to dispose of law suits on the merits of a case as opposed to technical disposition on procedural objections. See *Moore v. Illinois Central Railway Company*, 24 F. Supp. 731, *Scott v. Baltimore & Ohio Railway Company*, 151 F. 2d, 61.

Further, under Rule 15, F. R. C. P. leave to amend should be freely given in order to arrive at a just decision in the case. See *Maryland Casualty Company v. Rickenbacker*, 146 F. 2d 751, *Atlantic Coast Line Railway Company v. Mims*, 199 F. 2d 582.

Similarly it has been held that an amendment may be permitted even after dismissal. See *U. S. v. New-*

bury Mfg. Co., 123 F. 2d 453 and *Acme Distributing Co. v. Rorie*, 183 F. 2d 694.

Issues tried with the expressed or implied consent of the parties shall be treated in all respects as if they had been raised in the pleadings. In fact, it has been held that a Court should make findings on issues raised by evidence even though not contained in the pleadings. See *Lewis v. Coe*, 132 F. 2d 589.

Even in the Appellate Court, the lack of an amendment should not affect the judgment in any way. Where evidence is introduced which raises new issues and there being no objection, it has been held that a Court would not err in considering the new issues even though no application was made to amend. See *Underwriters Salvage Company of New York v. Davies & Shaw Furniture Company*, 198 F. 2d 450; see also *Menefree v. W. R. Chamberlin Company*, 183 F. 2d 720.

It has also been held that if justice requires, the Court may remand a case to permit Amendment of Complaint for trial on the amended issues. See *Champ v. Atkins*, 128 F. 2d 601.

It is submitted that under the law and circumstances existing here, the Amended Complaint submitted by plaintiff should have been granted to conform to the proof made by the evidence which demonstrated that the defendant railroad allowed a negligent condition to exist upon their land which resulted in injury to a third party.

It is submitted that the issue was not only raised by the pleadings, in pleading negligent "maintenance" of the animals, but was also tried by express or implied consent of the parties.

3. THE CUSTODY AND CONTROL OF THE LIVESTOCK IN A RAILROAD'S CORRAL IS JOINT CUSTODY AND CONTROL OF THE RAILROAD AND THE CONSIGNEE.

The Opinion of this Court affirming the decision of the District Court holds in effect that when livestock are placed in a corral at what purports to be the terminal point of the shipment, that the said railroad loses custody and control of said animals, and that the custody and control becomes that solely of the owner or consignee thereof. This determination was made by the Court despite the fact that the Southern Pacific Company admitted that (1) they had not received any receipt for the animals, and (2) that they had not been paid for the animals, and (3) that the animals had not been removed from their corrals and premises. The Restatement of Torts, Section 318 provides that if an actor permits a third person to use land or chattels in his possession, that person is under a duty to exercise reasonable care so as to control the conduct of that person, to prevent him from harming others in the use of that property. Thus, under this theory of law, the Southern Pacific Company, in permitting the consignee to use its corrals and property, had a

duty of care to the public and did not prudently discharge the duty.

In *Porter v. Thompson*, 74 C. A. 2d 474, the owner of property, maintaining a cattle auctioneering corral thereon, was held liable when cattle being auctioned by a third party escaped and injured persons. While it is true that the auctioneer had control and custody of the animal or animals which he was auctioning, it is likewise clear that the owner of the property had sufficient custody and control to require the exercise of reasonable restraint of animals on his land. He owed a duty to the public, as was found in that case. Civil Code, Sections 2120 and 2121 of California demonstrate a control and possession of property held by a railroad as being with the railroad *until such time as that property is removed from the premises of the railroad*.

The evidence conclusively demonstrated that the mules were held on Southern Pacific property until they escaped, that the two railroad cars which had originally transported them to Sacramento were held alongside of the corral and were subsequently used for reshipment of the animals to Santa Rosa, and that no receipt had been taken from the consignee for the animals when they arrived in Sacramento, and no payment for transportation was made for the animals until after they reached Santa Rosa. These facts, undisputed in the record, demonstrate a joint or dual control and custody of the animals sufficient to raise the duty of care by Southern Pacific to the public at large.

4. **THE JURISDICTION OF THE UNITED STATES COURTS IN THIS MATTER IS IN SERIOUS CONTENTION.**

The Petitioner herein has thoroughly set forth his position as relates to the jurisdiction of the United States District Court in this case, basing it primarily on the grounds that the case has been improperly removed. In the Opinion of the Court affirming the judgment of the District Court, no comment was made as to the fact that the plaintiff had moved the Superior Court to relieve himself of the motion to dismiss as to Mr. Coon. That motion was still pending at the time the Petition for Removal was filed by the defendant. Further, in conjunction with that motion for relief from the dismissal of Mr. Coon, there existed a motion to continue the cause for the purpose of securing service of process. In the case of *Southern Pacific v. Haight*, 126 F. 2d 900, the Court observed that a State Court is not precluded per se by the filing of a petition, but that said State Court retains jurisdiction to determine its jurisdiction and the merits of an attack upon such petition for removal. Since the filing of a Petition for Removal does not per se suspend and rescind the jurisdiction of a State Court, and because of the fact that motions were pending at the time of filing for removal herein, the Petition for Removal in this case was premature and the Federal Court was without jurisdiction herein.

5. THE DECISION FAILS TO APPLY CALIFORNIA AND FEDERAL STATUTES PERTAINING TO SHIPMENT OF LIVESTOCK.

This is a case of first impression involving the duty of care of a railroad engaged in the interstate shipment of livestock for hire as to the general public at large, and as relates to the operation of the corral facilities which the law requires such a railroad to maintain as regards to the general public at large. It is a case to determine whether the railroad can delegate its duty of care owed the public, under circumstances of maintaining livestock within its corrals, and is a case of utmost importance to the general public throughout this country.

A technical distinction has been made interpreting the pleading of the plaintiff as not embracing the issue as to the negligent maintenance of the property of the defendant, and that therefore the plaintiff is not entitled to recovery since no duty was owed.

In *Mering v. Southern Pacific Company*, 161 C. 297, it is provided that even though an owner may agree to accompany livestock, the company still has the duty to provide adequate feed, water, and properly equipped pens for their resting and feeding. Obviously, this decision implies an obligation and duty upon the part of the carrier to restrain the animals. Section 422 of the Agricultural Code of California requires a maintenance of adequate pens and corrals as does Volume 45, United States Code, Sections 71 and 72.

In 13 *Corpus Juris Secundum*, Carriers, Section 43, it is stated that adequate pens and corrals must be maintained by carriers who are transporting livestock for hire so as to prevent animals from escaping and a failure to fulfill this duty will render the carrier liable for any loss or injury sustained. This rule of law was announced also in *Texas Railway Company v. Bigham*, 28 Southwestern 162, and in *Texas and N. O. R. Company v. Lide*, 144 Southwestern 2d 685; also in *Brook and Olson v. Payne*, 181 Northwestern 803, it was provided that a railroad has a duty to maintain adequate corrals to prevent escape of animals.

In 3 *Shearman on Negligence*, Section 447, it was stated:

“Railroad companies have no power to lease their roads or to delegate their public duties without express statutory authority; and therefore a company which attempts to do so remains liable for injury suffered through the negligence of anyone operating any part of its road with its consent.”

In *Seay v. Southern Railway Company*, 37 Southwestern 2d 535; *Los Angeles and S. L. and R. Company v. Umbaugh*, 123 Pacific 2d 224; *Missouri Pacific Railway Company v. Newton*, 168 Southwestern 2d 812; and *Clifford v. New York Central*, 97 New York Supp. 954, it was held that a railroad company remains liable where it has attempted to delegate its public duties. In the *Los Angeles and S. L. R. Company v. Umbaugh* case, *supra*, it was held that that

rule of law applies even where the Interstate Commerce Commission has approved the delegation. In this case, the railroad company has sought to delegate to Mr. Coon its obligation to the general public to properly care for and restrain the animals that were held in the Southern Pacific's corral and to prevent their escaping and injuring people. Under the law of the cases above cited, such delegation is improper and the duty remains with the railroad as well as the person to whom that duty was sought to be delegated to see that reasonable care is exercised to prevent livestock from escaping from such corrals and injuring people.

In *Honaman v. Philadelphia*, 332 Pennsylvania 335, 185 Atlantic 750, and in *Stevens v. Pittsburgh*, 129 Pennsylvania Super., page 5, 198 Atlantic 655, the Courts held municipalities liable and owing a duty to the public when employees of said municipalities fail to control negligent conduct of third parties when such conduct was known to the park employees and created an unreasonable risk to persons outside of the park. In this case, the *Southern Pacific Company's* employees had actual notice within two hours of the accident that Mr. Coon was negligently conducting himself in regard to the restraint of the livestock, and that a negligently maintained fence existed on the railroad's property, and that said livestock could easily escape therefrom along public roads immediately adjacent to the corral and cause injury to third persons. The failure to control the negligent

conduct of Mr. Coon, and to correct the negligently maintained conditions then existing upon the railroad's property was the proximate cause of this accident.

It is respectfully submitted that this Court should grant the plaintiff appellant's petition for rehearing and that this Court should reverse the decision of the United States District Court.

Dated, San Francisco, California,
July 22, 1957.

Respectfully submitted,

BARNETT & ROBERTSON,

CHARLES J. MILLER,

By RODNEY H. ROBERTSON,

*Attorneys for Appellant and
Petitioner.*

(Appendix Follows.)



Appendix.



Appendix

In the United States District Court for the Northern
District of California, Northern Division

No. 7317

Glen Earl Grigg,

Plaintiff,

vs.

Southern Pacific Company, etc., et al.,
Defendants.

NOTICE OF MOTION TO AMEND COMPLAINT TO CONFORM TO EVIDENCE

To: Southern Pacific Company, Defendant, and

To: Devlin, Diepenbrock & Wulff, its attorneys:

You Will Please Take Notice That on Monday, the 23rd day of April, 1956, at 9:30 o'clock A.M. of said day, at the courtroom of the above entitled court located at the Federal Building, Sacramento, California, plaintiff will move the court for its order allowing the filing of the annexed Second Amended Complaint to conform to the evidence adduced at the trial of the said matter.

Said motion will be based upon the evidence, both oral and documentary adduced at the trial of the

matter, all exhibits admitted, and all the papers, pleadings and other documents on file herein, and the file of the case.

Dated: April 6, 1956.

Barnett & Robertson, Charles J. Miller,
By Charles J. Miller,
Attorneys for Plaintiff.

In the United States District Court for the Northern
District of California, Northern Division

No. 7317

Glen Earl Grigg,	} Plaintiff,
vs.	
Southern Pacific Company, etc., et al.,	
Defendants.	

MOTION TO AMEND COMPLAINT
TO CONFORM TO EVIDENCE

Pursuant to Rule 15(b), plaintiff moves the honorable court for its order allowing the filing of the annexed Second Amended Complaint to conform to the evidence adduced at the trial of the above matter.

This motion is based upon the evidence, both oral and documentary adduced at the trial of the matter, all exhibits admitted, and all the papers, pleadings, and other documents on file herein, and the file of the case.

Dated: April 6, 1956.

Barnett & Robertson, Charles J. Miller,
By Charles J. Miller,
Attorneys for Plaintiff.

In the United States District Court for the Northern
District of California, Northern Division

No. 7317

Glen Earl Grigg,

Plaintiff,

vs.

Southern Pacific Company, etc., et al.,
Defendants.

SECOND AMENDED COMPLAINT

Plaintiff complains of defendants, and for causes of action alleges:

I.

That at all times mentioned herein the defendant Southern Pacific Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and doing business in the State of California, and other states, and at all times herein mentioned was, and now is, engaged in the business of a common carrier by railroad in interstate commerce in the State of California and other states.

II.

Plaintiff does not know the true names of the defendants designated herein by the fictitious names of

First Doe to Sixth Doe, inclusive, and plaintiff prays leave to substitute their true names when the same become known to him and to substitute appropriate charging allegations concerning said fictitiously designated persons.

III.

That at all times mentioned herein, the said defendant, Southern Pacific Company, owned, operated and maintained railroad lines in and about the City of Sacramento and warehouses, corrals and appurtenant properties and facilities, used in the operation in said railroad by said defendant. That at all times mentioned herein Park Overpass was and is a part of U. S. Highway 40, running in a generally easterly and westerly direction and is located approximately one mile west of Sacramento, California.

IV.

That on or about Friday, December 17, 1954, at or about the hour of 6:15 o'clock p.m. of said day, the plaintiff, Glen Earl Grigg, was operating a 1955 Cadillac automobile sedan, license No. California 2X10758, which automobile was owned by said plaintiff, in a generally easterly direction on the said Park Overpass, U. S. Highway 40, about one mile west of Sacramento, California, and that said plaintiff was proceeding on said highway east towards Sacramento, California.

V.

That on December 16, 1954, defendant Southern Pacific Company, acting as a common carrier for hire,

brought to its corral located at Broderick, California, a shipment of certain horses and mules consigned to one H. L. Coon; said horses and mules were then and there unloaded into said corral owned by defendant Southern Pacific Company and used by said defendant in the operation of said railroad by said defendant; said horses and mules were then held upon the property of defendant Southern Pacific Company pending determination of final destination of said shipment of horses and mules, which final destination was, on December 18, 1954, determined to be Santa Rosa, California.

VI.

That on December 17, 1954, defendant Southern Pacific Company was so negligent, careless, and reckless in the operation, ownership, and maintenance of said corral and premises as to allow said horses and mules to escape therefrom and stray upon the said Park Overpass on U. S. Highway 40 and into and upon the main travelled portion of said highway, and into the path of the plaintiff's oncoming car, and that at said time and place, the car of plaintiff was caused to be struck by one or more of said horses or mules with great force and violence, severely damaging the automobile of plaintiff and causing plaintiff to sustain the personal injuries hereinafter set forth.

VII.

That by reason of said wrongful, careless and negligent acts, omissions and conduct of the defendant

Southern Pacific Company and its agents, servants and employees, and as a direct and proximate result thereof, plaintiff sustained the following injuries, to wit:

Severe lacerations of his right index and middle fingers and a contusion to the right occipital region of plaintiff's scalp and contusions and abrasions to the left half of plaintiff's thorax anteriolaterally; contusions and abrasions to the right hand with fracture of a bony deformity in the right hand; and contusion to the pelvis and injury to the left hip joint located generally in the femoral triangle region continuing back to the buttock, and severe mental shock, pain and suffering, together with multiple contusions, lacerations and abrasions in and about and upon the body of said plaintiff, all of which rendered the plaintiff sick, sore, lame and disabled, and that he will suffer permanent injuries and disfigurement as a result thereof, and that by reason thereof, plaintiff has been damaged in the sum of Seventy Thousand Dollars (\$70,000.00).

VIII.

That as a direct and proximate result of the said negligence and carelessness of the said defendant as above alleged, and the injuries suffered therefrom, it was necessary that the plaintiff be hospitalized and plaintiff was required to, and did obtain the services of physicians and surgeons, nurses, hospital and medical care and will be required to expend further sums for the same in the future; that the amount thereof is not now known to plaintiff, and plaintiff prays

leave to amend this complaint when the sums so expended are ascertained.

IX.

That further, as a direct and proximate result of the said negligence and carelessness of the said defendant, as above alleged, and the damages sustained to plaintiff's 1955 Cadillac sedan automobile, plaintiff has been caused to expend sums of money to repair said automobile, and by virtue of said damage to said automobile, the same has depreciated in value and plaintiff has therefore been damaged in the sum of Sixteen Hundred Fifty Dollars (\$1,650.00) by virtue of the costs of said repairs and the depreciation in value of said automobile as aforesaid.

X.

That further, as a direct and proximate result of said negligence and carelessness of defendants as above alleged, plaintiff was caused to become obligated to pay the expenses of towing his automobile so as to remove same from the place of accident to the repair shop and for the loss of use of said automobile, causing him to disburse sums of money to secure the use of another car while his automobile was being repaired, the exact amount of which expenses are presently unknown to the plaintiff who prays leave of this Court to insert the said sum at this place when the same becomes known to plaintiff.

Wherefore, plaintiff prays judgment against defendants for the sum of Seventy Thousand Dollars

(\$70,000.00) General Damages, for the sum of Sixteen Hundred Fifty Dollars (\$1,650.00). Special Damages represented by the damage done to plaintiff's automobile, and for such other special damages and sums of money as plaintiff shall expend for medical care, including doctors, nurses, hospital, ambulance, X-rays, and for his cost of tow service and loss of use of automobile during the period it was being repaired, and for such other and further and different relief as to the Court may seem just and equitable in the premises.

Dated:

Barnett & Robertson, Charles J. Miller,
By Charles J. Miller,
Attorneys for Plaintiff.

State of California,
County of Sacramento—ss.

Charles J. Miller, being first duly sworn, deposes and says:

That he is an attorney at law admitted to practice before all courts of the State of California and has his office in the County of Sacramento, State of California, and is an attorney for plaintiff in the above entitled action; that plaintiff is unable to make the verification because he is absent from said County and for that reason affiant makes this verification on plaintiff's behalf; that he has read the foregoing Complaint and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters he believes it to be true.

Charles J. Miller.

Subscribed and sworn to before me this 5th day of April, 1956.

Thomas Wallner,
Notary Public in and for said
County and State.

AFFIDAVIT OF SERVICE BY MAIL
(C.C.P. 1013A)

(Must be attached to original or a true copy of
paper served)

State of California

County of Sacramento—ss.

No. 7317

Emmy Lou Stevenson, being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of Sacramento County, and not a party to the within action.

That affiant business address is 926 J Building, Sacramento 14, California. That affiant served a true copy of the attached Notice of Motion to Amend Complaint, Motion to Amend Complaint, and Second Amended Complaint by placing said copy in an envelope addressed to Devlin, Diepenbrock & Wulff at his office address 414, 926 J Building, Sacramento 14, California, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on April 6, 1956, deposited in the United States mail at Sacramento, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

Subscribed and sworn to before me on April 6, 1956.

Emmy Lou Stevenson.

Charles J. Miller,

Notary Public in and for said

County and State.





